Supreme Court, U. S.
FILED
APR 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 78-1508

SKAGGS RUDDER, ET. AL.,
APPELLANTS

V.

WISE COUNTY HOUSING AND REDEVELOPMENT AUTHORITY,
APPELLEE

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

Term, 1979

NO. 79-

SKAGGS RUDDER, et al.,

Appellants

V.

WISE COUNTY HOUSING AND REDEVELOPMENT AUTHORITY,

Appellee

On Appeal from The Supreme Court of Virginia

JURISDICTIONAL STATEMENT

The Appellants in this case appeal from the opinion and order of The Supreme Court of Virginia which affirmed the trial court judgment of the

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

Circuit Court of Wise County, Virginia, which sustained a federal constitutional challenge to Title 36, and more specifically §36-48.5 and §36-49(5) of the 1950 Code of Virginia, as applied, under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. More specifically, §36-49(5) of the 1950 Code of Virginia, as amended, allows Redevelopment and Housing Authorities such as the Appellee to make land acquired by right of eminent domain procedures

> ". . . available to private enterprise . . . (including sale, leasing, or retention by the authority itself). [Emphasis supplied]

The Appellants argued below that such a law, providing for the taking of private property by a public agency for ultimate re-distribution to other private interests was a direct violation of the equal protection and the substantive and procedural due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution.

Additionally, §36-48.5 and §36-49 of the 1950 Code of Virginia, as amended, were interpreted in this case, over a clear constitutional challenge to them if interpreted in such a manner by the Appellants, to allow such redevelopment and housing authorities to seize property by eminent domain for the purpose of developing (vis-a-vis re-developing) basically undeveloped rural land and thereby establishing such authorities as economic competitors with private owners but giving them the unnecessary and arbitrary and monopolistic advantage of condemnation of opposing interests' land in violation of the opposing interests' substantive due process.

Your Appellants also argued below that this particular project in calling for the rechannelization of the Clinch River, would violate the preemptive rights of the Federal Government to the control of navigable waters under Article I, §8 of the United States Constitution and under Title 33 of the United States Code.

In addition, the Appellants had argued below that the environmental impact study (which had

been prepared) did not adequately consider the detrimental effects of the proposed project on the geological, anthropological, atmospheric and public health environments of the St. Paul, Virginia, area, with special emphasis on their effect on the human species, in violation of the Federal Environmental Protection Act.

In all of these arguments, the Supreme Court of Virginia upheld the Virginia Law and/or authority which had been challenged by the Appellants as being violative of the Constitution and/or laws of the United States.

THE OPINIONS BELOW

Both the Letter Opinion and the Final Order of the Circuit Court of Wise County, Virginia, of December 30, 1976, is not officially reported, but was made a part of the record in the Supreme Court of Virginia and is filed as Appendix[1] "A" herewith.

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[1]Hereinafter "App.", all Appendix references herein are to the Appendices printed as an attachment to this Statement.

The Certificate of a Writ of Error and Supersedeas to that Order was awarded by the Supreme Court of Virginia on September 22, 1977, a copy of which is retyped as App. "B" herewith.

The final decision and opinion of the Supreme Court of Virginia, dated November 22, 1978, is reported in ____ Va. ____, and is unofficially reported in 249 S.E. 2d 177, a copy of which is attached herewith as App. "C".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) These proceedings were originally brought by the Appellee (a local redevelopment and housing authority which was established under a State law written and passed primarily to effectuate slum clearance in urban areas) against your Appellants through the medium of a Petition for Condemnation (see App. "D" attached herewith) for the purpose of seizing land owned by them on the bank of the Clinch River in the small town of St. Paul in rural Wise County, Virginia, which they proposed to include in a certain so called "redevelopment"

plan, which primarily involved the leveling of a mountain for a privately owned and developed subdivision and commercial park and the rechannelization of the Clinch River which is a navigable river under exclusive federal jurisdiction.

The authority for seizing your Appellant's property was set forth in the Petition for Condemnation as being Title 36 of the 1950 Code of Virginia including §36-48.5, §36-49, and more specifically, §36-49(5), which allows such authorities to make land acquired by condemnation "available to private enterprise. . ."

In their answer, subsequent defense and appeals, your Appellants raised the question of whether or not Title 36 of the Virginia Code and the petitioned for condemnation were constitutional under the Fifth and Fourteenth Amendments of the United States Constitution (and specifically whether the taking for re-conveyance to private parties as allowed under §36-49(5) of the 1950 Code of Virginia was constitutional). By implication they also questioned whether the Code section

allowing this taking was constitutional under Article I, §8 of the United States Constitution since it involved the rechannelization of a river under federal jurisdiction.

They also questioned the constitutionality of Title 36 of the Virginia Code to the extent that it allowed condemnation for a so called redevelopment project which, while claiming that it was aimed at correcting so called "blighted housing", actually encompassed land which had less than 20% "blighted housing" and which project would have provided no new housing which could have been afforded by those living in such so called "blighted housing", but which was in actuality a means of using a local governmental agency with the unfair advantage of the power of eminent domain into competition with private enterprise to develop privately owned subdivisions and commercial areas in violation of your Appellants' substantive due process rights. Both the lower court and The Supreme Court of Virginia ruled that the taking for these purposes is allowed by the statutes cited and is

constitutional.

In addition,[2] while the Appellee did prepare an environmental impact statement, the Appellant argued that the statement was not adequate under the State Constitution and Federal law (see Answer filed as App. "E" herein). The lower court and the Virginia Supreme Court both held that the environmental impact statement was not inadequate to meet the standards of Federal law. Other issues involving rights, privileges and immunities under the Constitution and laws of the United States (including the local agency's right to condemn land to rechannel a navigable stream under the constitutional and statutory jurisdiction of the United States), were raised below by the Appellants and

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[2]While this proceeding is set up as an appeal based on the Virginia Supreme Court's holding that the taking of private property for resale to other private parties as allowed under §36-49(5) of the 1950 Code of Virginia was constitutional, it is noted by Appellants that this Court has previously held that an Appellant can also assign other grounds on appeal which, if standing alone, could be reviewed only by certiorari. See, e.g. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 66 L. Ed. 1044, 42 S. Ct. 516, 27 ALR 27 (1922); Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975).

were directly or by implication ruled against your Appellants (and their alleged Federal rights and privileges).

(ii) The opinion of the Supreme Court of Virginia which so held[3] was filed on November 22, 1978 (see App. "C"). A request for a re-hearing was not sought. The Notice of Appeal herein was filed with the Clerk of the Supreme Court of Virginia by hand delivering it to his office in the State Supreme Court Building on February 17, 1979, (see App. "F", pp. 1-3) and copies were mailed February 16, 1979, to the Clerk of this Court and opposing counsel. In connection with the filing of the Notice of Appeal, Appellants by counsel also

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[3]It should be noted that in regard to some of the Federal issues so raised there was no mention by the Virginia Supreme Court. However, it is submitted that by failing to rule on such issues, that Court impliedly overruled the Appellants' contentions because it could not have upheld the lower court and the statutory validity of the taking without doing so. [See Fisk v. Kansas, 274 U.S. 380 (1927); New York v. Zimmerman, 278 U.S. 60 (1928)].

on February 16, 1979, filed a motion with the Chief Justice under the provisions of 28 U.S.C. §2101(c) for an extension of time to apply for a writ of certiorari and/or to docket an appeal herein (see App. "F", pp. 4 and 5) for which they received an Order signed by Mr. Chief Justice Burger on the 27th day of February, granting the requested extension of time through and including April 1, 1979.

(iii) Jurisdiction for this appeal is conferred on this Court by Title 28 of the United States Code, §1257(2) and/or (3).[4]

(iv) Cases sustaining the jurisdiction of this Court include (in addition to those cases listed in footnotes 2 and 4, supra):

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[4]See fn 2 supra, see also: Smith v. Slayton, (1973, D.C. Va.) 369 F. Supp. 1213; Gillespie v. Oklahoma, 257 U.S. 501, 66 L. Ed. 338, 42 S. Ct. 171 (1922); Myers v. United States, 272 U.S. 52, 71 L. Ed. 160, 47 S. Ct. 21 (1926); See also, Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628, 4 L. Ed 2d 1002, 80 S. Ct. 1050 (1960), which specifically held that where an item was not subject to appeal by this Court under 28 U.S.C. §1257 the Court could treat appeal papers as a petition for certiorari and review the State Court decisions on certiorari.

Myles Salt Co. v. Board of Commissioners, 239 U.S. 478, 60 L. Ed. 392, 36 S. Ct. 204 (1916);

N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 9 L. Ed. 2d 279, 83 S. Ct. 312 (1963);

New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L. Ed 184, 49 S. Ct. 61, 62 A.L.R. 785 (1928).

(v) The constitutional validity of Title 36 and especially §36-48.5, §36-49 and §36-49(5) of the 1950 Code of Virginia, as amended, as applied herein (which allows public housing authorities, under their powers of eminent domain, to first seize land from private parties and then to redistribute it to private parties for various illegal and/or unconstitutional purposes), is involved in this appeal and has been since the beginning of these proceedings in the Circuit Court of Wise County, Virginia.

The full text of those sections may be found as App. "G" attached and filed herewith.

QUESTIONS PRESENTED BY THE APPEAL

1. Did the Supreme Court of Virginia and the trial court err when they ruled that the taking herein under §36-49 of the 1950 Code of Virginia, as amended, was a constitutional exercise of the power of eminent domain in violation of the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution when over 75% of the land taken for the project area was admittedly to be resold to private interests for private purposes, and in so doing, did they necessarily and erroneously uphold the constitutionality of §36-49(5) of the 1950 Code of Virginia as so interpreted and applied?

2. Did the Supreme Court of Virginia and the lower court err by ignoring the preeminence, the requirements and the substantial environmental safeguards of the National Environmental Policy Act, (42 U.S.C. §4331 et. sig.) where the question of both State and Federal law was raised first at the trial court level; where the condemning authority was proposing to use extensive Federal

funding from the Department of Housing and Urban Development[5] (H.U.D.) to carry out the project and was thereby clearly subject, under federal law, to meeting the requirements of a full and adequate environmental impact statement before it had any right to take any action toward the carrying out of that project (including the seizing of your Appellants' land through eminent domain); and where, if the environmental impact statement were seriously considered (as is required under Federal law), it would not begin to meet the Federal standards as set forth in 42 U.S.C. §4332(c)(d) and (g), and, in fact, could and probably would cause very serious environmental harm to the medico-anthropological, the psycho-anthropological and the geo-economical environments of the human species of the St. Paul, Virginia, area.

3. Was the seizing of your Appellants' property under the authority of §36-49 of the 1950

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[5]In the interest of time and space all federal agencies will hereinafter be designated by their normally accepted acronyms in parenthesis after their first use, e.g., H.U.D.

Code of Virginia by a purely local agency for a purely local project[6] whose only really "public purpose" was the rechannelization of the Clinch River (which was stipulated by both parties to be a navigable river) an unconstitutional and unlawful violation of the Federal Government's preemptive rights to control navigable waters under Article I, §8 of the United States Constitution and under Title 33 of the United States Code (including but not limited to 33 U.S.C. §§403, 411, 419, 466, 467 and 497), and to the extent that §36-49 of the 1950 Code of Virginia allows such local usurpation of Federal constitutional rights, is that section of the State Code unconstitutional?

4. Were §36-48.5 and §36-49 of the 1950 Code of Virginia, as amended, unconstitutional under

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[6]Even though the Appellee was calling for massive grants from H.U.D. for so called "slum clearance" so as to qualify this project, and even though massive funds would be spent to rechannelize a river constitutionally under Federal jurisdiction, this is true.

the substantive due process provisions of the Fourteenth Amendment to the United States Constitution to the extent that they allowed the involuntary seizure of private property supposedly under the guise of the redevelopment of urban blight, where the actual project area exists in a rural setting and where the majority of the project area is undeveloped mountainside and riverbed or bottom; and whether such seizure constitutes an infringement of your Appellants' rights to hold and enjoy real property safe from arbitrary seizure by governmental entities as guaranteed by the substantive due process provisions of the Fifth and Fourteenth Amendments to the U. S. Constitution?

STATEMENT OF THE CASE AND PERTINENT FACTS

A. History of The Proceedings Below

On or about the 14th day of April, 1976, the Wise County Redevelopment and Housing Authority (hereinafter referred to as the Appellee) filed a Petition of Condemnation in the Circuit Court of Wise County against the Appellants, Skaggs Rudder and his wife, Wilma L. Rudder.

The Appellants-Defendants filed an answer on May 11, 1976, denying that the Wise County Redevelopment and Housing Authority was duly constituted; denying that it was properly created under Title 36 of the Code of Virginia; denying that it had a constitutional authority to condemn this land even if it did have statutory authority; denying that it was necessary or proper for the Appellee to condemn this property; denying that the area was properly designated as a "blighted area" and raising the constitutional question regarding the necessity of a full and proper environmental impact statement, the lack of which either under State or Federal law would serve to prevent the completion of the project and, therefore, would make the condemnation of this property neither necessary nor proper under both State and Federal law.[7] They denied that the property and area was "blighted". They alleged that the purpose of the

[7]See Answer, App. "E", ¶III, attached herewith.

taking by the Appellee was to develop it and to resell it to private interests in violation of the equal protection and due process provisions of the State and the Federal Constitutions[8], and they called for strict proof of all elements of the allegations in the Appellee's Petition for Condemnation. They further alleged that the taking of land by this local agency for the (partial) purpose of rechannelizing the Clinch River was proper or valid under the Constitution of the United States[9]; and they generally alleged that the taking of this land for the purposes stated was generally and entirely in violation of the Appellants' constitutional rights.[10]

By later pleadings and arguments they raised further constitutional objections in substance to

[8]See Answer, App. "E", ¶V, attached herewith.

[9]See Answer, App. "E", ¶VI, attached herewith.

[10]See Answer, App. "E", ¶I and ¶V, attached herewith.

the lack of due process and equal protection inherent in this proposed project and the taking of private property therefore.

Thereafter, the issues were joined and depositions were taken to be read de bene esse on the Appellants-Defendants' Answer (which was treated as a Motion to Dismiss by the Court). Those depositions were taken on August 26, 1976, August 30, 1976 and September 13, 1976.

On November 15, 1976, the Court indicated it would withhold ruling on the Appellants' Motion to Dismiss (Answer) pending further argument.

On December 30, 1976, the Judge entered his Final Order in the case upholding the Commissioners' evaluation and overruling the Appellants' constitutional, statutory and environmental objections to the taking.

On January 18, 1977, the Appellants noted their appeal and upon their Petition an appeal was awarded on September 22, 1977.

In their brief to the State Supreme Court, while dealing primarily with State issues in that

forum, your Appellants raised all the issues mentioned above.[11]

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[11]Thus on p. 19 of their brief in the State Supreme Court, your Appellants said:

"It is recognized by the Defendants that some of the land taken in the project will be utilized for the rechannelization of the Clinch River, but it is respectfully submitted that there would be very serious questions of whether any statute allowing condemnation by a redevelopment and housing authority for the rechannelization of rivers would itself and/or any individual application thereof would violate the preemptive rights of the federal government to the control of navigable waters under Article I, §8 of the United States Constitution and under Title 33 of the United States Code. (See e.g., Moran v. New Orleans, 112 U.S. 69, 28 L. Ed. 653, 5 S. Ct. 38 (1884). See also 33 U.S.C. §§403; 497; 411; 419; 466 and 467.)"

And on p. 32 of their brief therein your Appellants argued:

"It is conceivable that such a different interpretation could bring into play a very significant and recently little raised or understood question of "substantive due process" as well as the more conventional constitutional issues. See e.g. the statements set forth in the United States Supreme Court's opinion of Ohio v. Helvering, 292 U.S. 360, 54 S. Ct. 725, 726, 78 L. Ed. 1307 where it is said:

'Nevertheless the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. Rippe v. Becker, 56 Minn. 100, 111, 112, 57 N.W. 331, 22

On November 22, 1978, The Supreme Court of Virginia entered its opinion and order upholding the Circuit Court of Wise County and overruling all statutory and constitutional objections raised by the Appellants. (See App. "C", filed herewith.)

From there your Appellants first requested -- on February 16, 1979 -- and received -- on February 27, 1979 -- an extension of time for the docketing of this Appeal -- until April 1, 1979 -- (See App. "F", filed herewith) and now do so.

B. Statement of the Pertinent Facts

Skaggs and Wilma Rudder are husband and wife and own a piece of real property located in the town of St. Paul in Wise County in the Commonwealth of Virginia.

Footnote 11, continued:

L.R.A. 857. If a state chooses to go into the business of buying and selling. . .[property] its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power.'

for in such a situation the state would be acting in a purely proprietary function and like any other business would not and cannot have or exercise the power of eminent domain."

St. Paul is a small town of less than 2,000 people[12] on the banks of the Clinch River in the southeastern corner of Wise County which is a rural county in the Appalachian coalfields of Southwestern Virginia.[13]

It is uncontroverted, and indeed was agreed by stipulation of the parties at the time of the evaluation hearing that the Clinch River is a navigable river.[14]

Through depositions and hearings testimony was elicited to buttress the Appellants' contentions and certain facts your Appellants believe have been established to support their position

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[12]See Vol. 23, Collier's Encyclopedia, p. 162 (1967 Ed.) (enumeration of population of Virginia counties, cities and towns).

[13]It should be noted that the entire population of Wise County as late as 1967 was not over forty-four thousand (44,000) people. Ibid.

[14]Indeed this was important to the condemning authority, since if it were not a navigable stream under Federal jurisdiction, the Appellants would have had to have owned to the middle of the river and they would have had to have paid them for the additional property.

in this case.

1. Facts relating to the taking of property belonging to private parties for resale to private parties.

As to the Appellants' contention that the purpose of the taking of the land for all of the project was to redistribute that land to private parties for private use, ownership and control. To support their contention, the Appellants called as an adverse witness, Mr. Charles McConnell, the Assistant Director of the Housing Authority. His testimony establishes that approximately 75% of the project area will be developed for private use. (R, p. 131-149) Indeed, with the exception of a small public park, the public uses of the project would be, as delineated by Mr. McConnell: the channelization area and the new roads. (R, p. 139) The sewage treatment plant which is shown in the record and spoken of as being in the project area was already in place and operating. (R, p. 138) Additionally, there can be no question about the fact that subdivisions will be used for private ownership and control and will not be for

public housing and that the owners of the commercial property as well as the private residential owners will exercise the same dominion and control over their property as any other private property owners. (See R, p. 132-138)

Thus he testified:

"Q. Would you tell me what these lots are up here numbered '1' to apparently '45' with roads going through and turn-arounds?

A. That is a proposed subdivision.

Q. And are houses going to be built on that subdivision?

A. That is the plan, yes.

Q. And what's going to happen with these houses?

A. Hopefully, they'll be built and be lived in.

Q. And who will live in them?

A. The people that purchase the land and build the houses.

Q. I see. So then all of this land up here is going to be sold back to individual owners; is that correct?

A. That's my understanding, yes."
(Appendix to State Supreme Court Brief, hereinafter referred to as R, pp. 131 and 132)

He further stated:

"Q. All right, sir. Now if I were to buy lot number '1' and build a house on it, could I keep you from coming into that house if I wanted to?

A. Sure.

Q. Could I keep Mr. Stump from coming into it if I wanted to?

A. Certainly.

Q. Could I keep the Judge from coming into it if I wanted to and wasn't a lawyer appearing before him?

A. I don't know, I guess. I don't know.

Q. All right, sir. And that's true with any of these forty-five lots; is that correct?

A. That's my understanding, yes.

Q. All right, sir. Let's go on to this building here which is a yellow building adjacent to lot number '43' and '42'. What's that going to be?

A. That is part of the proposed commercial district.

Q. All right. Well, will that be some kind of a commercial building, then?

A. That is what is proposed, yes.

Q. And what will happen to that? Who will use it? . . . What type of party or parties would use it?

A. Some individual that would buy it and

put a business in.

Q. All right. So then is that true of all of these buildings shown adjacent to lots '36' to '45'?

A. That's my understanding, yes.

Q. So that land would also be bought and used for private commercial endeavor; is that correct?

A. Yes.

Q. And it would be sold by the Wise County Housing and Redevelopment Authority (sic); is that right?

A. How it will be disposed of, I don't think has been set, but probably. I mean, it's not --

Q. It will be sold, at any rate, . . .

A. Yes.

Q. . . . to private owners.

A. Yes.

Q. Can the public, once it's sold and these buildings are open, can the public come through and go in and out at will?

A. If the property owner so indicates.

Q. What if the property owner doesn't want them to?

A. Then I suppose they can't.

Q. All right, sir. Now, how about these four buildings or four complexes down below Wise

Street toward the Norfolk and Western Railway - are they also commercial establishments?

A. Yes.

Q. And will they also be sold to private enterprise?

A. Yes.

Q. And private enterprise will have control over them; is that correct?

A. Yes."
(R, pp. 133-135)

And in summation of this, he stated:

"Q. All right, sir. Thank you very much. In other words, -- Let me come back on this. In other words, all of the land in this project, either you don't know what you're going to do with it or it's going to be ultimately turned over for private use except for these open areas at the top and for the roads; is that right?

A. And the channel area.

Q. And the rechannelization of the river."
(R, p. 138)

2. Facts relating to the issue involving the environmental impact statement

As to your Appellants' contentions relating to the environmental impact statement, it is not disputed by your Appellants that an environmental impact statement on the project was prepared by the Department of Housing and Urban Development

(HUD); however, as far as the substantial nature of the environmental questions raised in the case at bar, the Court need only to read Dr. Bartlett's totally uncontradicted testimony as to the serious nature of the environmental harms that can be expected to result as a result of the Appellee going ahead with this project.

a) The Dust Problems and Human Health In St. Paul

Thus, Dr. Bartlett testified on page 20 of the Hearing of August 16, 1976 (R, p. 41) extensively as to the fact that the environmental impact statement which was prepared by HUD in this instance paid almost no attention whatsoever to the seriousness of the dust that would be put into the atmosphere during the leveling of the mountain which would then be a serious hazard to the people living in the immediate St. Paul vicinity. He further testified that this was especially dangerous since so many of these people were coal miners and already were subjected to serious dust problems and the dread disease of pneumoconiosis.

Thus, Dr. Bartlett testified:

"Q. All right, now, is there any discussion whatsoever in the so called environmental impact study concerning the types of dust that would be created?

A. None that I remember from reading it.

* *

Q. How much, how many pages is the total environmental impact study, Dr. Bartlett?

A. It is over 200 pages.

Q. About how much is devoted to the dust problem?

A. Probably less than two pages."

b) The Psychological and Other Danger Of Blast Vibrations To The Lives And Property Of The Human Inhabitants Of St. Paul

In addition to the dust and the potential deleterious effects on human health caused by that problem, Dr. Bartlett testified without contradiction and with a great deal of experience concerning the severe potential danger to the lives and property of people living in and around St. Paul from blasting used to level the mountain.

(See R, p. 48)

"Q. All right, sir. Now, have you been called upon as an expert witness in cases involving suits because of dust and because of blast damage?

A. Yes.

Q. On both sides?

A. Yes.

Q. Both for the quarry operator and against the quarry operator?

A. Yes.

Q. And what experience have you had in relationship to the removal of heavy stone formations such as this granite and sandstone that we're talking about in relationship to surrounding buildings or neighboring buildings - homes, stores and so forth?

A. Well, a great deal of study has been made of the blast damage effects by the Bureau of Mines. They have reports which indicate charts which can be utilized to show how much powder can be used safely, but their report generally talks about a single blast and its effect on structures. There are very definite guidelines that are used by all quarry operators, and at the present time, since last September I believe it is, there's even in the State of Virginia regulations by the Mines office in Big Stone Gap which follow almost verbatim the report from the Bureau of Mines in this regard, but very little study has been done of the problems related to repeated blasting from the same general location, and obviously there will be several multiple blasts necessary to construct this highway project and to level the land for the housing project.

Q. Now, we're talking here about in effect leveling a complete ridge.

A. Yes. It's a large one.

Q. Can you give an estimate of how long, from your experience with quarries and so forth, how long it would take to remove that stone or how many blasts would be, have to be made? Would it be a number of blasts?

A. I would just simply say it will take certainly many blasts, because you're talking about a large area."
(See R, p. 49)

And he further testified as to the inadequacy of the proposed Bureau of Mines Standards[15] set forth in the environmental impact statement in the instant case:

"Q. And what has been your experience in dealing with blast problems in relationship to the validity of the standards set by the Bureau of Mines when you're talking about multiple blasts?

A. Well, its' obvious that the Bureau of

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[15]It should be noted that as a result of Dr. Bartlett's testimony in several of these cases the blast standards set forth in the new regulations regarding strip mining are substantially more restrictive than standards set in the environmental impact statement herein. See CSPI Energy Series XI, Strip Mine Blasting, pub. under Federal Grant by the Center for Science in the Public Interest, 1977.

Mines' report is very deficient in this aspect, because in several cases that I have investigated, damage has occurred at a blast limit that has only slightly been exceeded or not even been exceeded according to the Bureau of Mines' report, and yet the structures nearby have definitely been damaged, and I have felt that this is the result of the repeated blasts, the cumulative effect; the same effect that you get from bending a piece of steel enough times it will finally break. The same idea of fatigue factor in a structure is going to be brought in here in this case.

Q. And are they now just beginning to do studies of the cumulative effect and fatigue structure?

A. Yes. It's my understanding from a report of a visitor this summer that is dealing with this that the Bureau of Mines is now reconsidering and doing some retesting of this.

* *

Q. Now, is there anywhere in this study whatsoever that considers the cumulative effect of multiple blasting on this ridge to the houses and the rest of St. Paul?

A. No, there's not any report on that, nor can I find any suggestion as to limitations on the amount of blasting that should be done versus, you know, proximity to structures.

THE COURT: (To the Witness) Does it have anything on the effect that the blasting in that project might have on adjacent areas?

A. Only in passing; just very brief mention of the fact that they will be blasting and that this will have a noise factor, but they don't consider in the report the possibility of damage to the structures from the blast."
(R, pp. 51 and 52)

And as to alternatives and/or suggestions set forth in the environmental impact statement (as required by Federal Law) Dr. Bartlett again testified:

"Q. And does the methodology of blasting have something to do with the damage effect?

A. Definitely.

Q. Is it possible to say whether or not a house in a vicinity will be damaged without discussing the methodology of the blasting?

A. They can discuss it and say that if they take care and just in a very general sense, and I think that's all they're saying here, is that if they take proper precautions and use normal procedures they would, they expect that the houses would not be damaged. Again, I can't recall the wording on how they put that, but there's nothing in detail about how they're to go about it, or given a certain distance from the house, what limitations should be imposed on the blasters as to how many holes and how much powder per hole and all that, which is part of the methodology.

Q. All right. Now, is there any discussion as to how close the nearest homes and businesses will be to the blasting anywhere in that report?

A. None at all.

Q. Does the distance of a building from the blasting have an effect on whether that building will be damaged or not?

A. Positively. It is a proportional effect. Obviously, the closer you are to the same charge, the more likely you're to have damage, or the

further you're away from it, the less likely."
(R, pp. 53 and 54)

Finally, as to the psychological stress on the human animal in the St. Paul economic and psychological environment, Dr. Bartlett (again without contradiction) testified:

"Q. All right, sir. Now, does blasting have a physical and psychological effect on humans in the area?

A. Yes, it does, particularly multiple blasts frequently -- Well, not frequently I wouldn't say, but occasionally persons that may be unstable or not, become unstable and have psychological problems from the repeated occurrences of --

Q. Is there anything, Dr. Bartlett, anything at all in that environmental impact study that discusses the potential psychological impact on the people from the multiple blasting?

A. No.

Q. No word of that at all.

A. No.

Q. Is there anything at all that discusses the potential physical damage to people from blasting?

A. None."
(R, pp. 58 and 59)

c) The Danger Of Flyrock To The Lives And Property Of Humans Living In And Around St. Paul

In addition to discussing the other environmental impact problem on page 59 and 60 of the Appendix of the same hearing, Dr. Bartlett testified significantly about the danger of flyrock, which is rock that is blasted loose when shots are set off in the leveling process which could fly for some distance and land on top of people, animals and houses. In fact, he testified that there had been an extensive problem of this in the Wise County area:

"Q. What is the biggest piece of flyrock that you are personally familiar with having gone into a residence in this area?

A. Into the yard, I saw one that weighed better than 200 pounds. It would have taken a couple of people to lift it up.

Q. And can you state whether or not this flyrock has caused eminent danger to the people living in the area of strip mining and so forth in Wise County, of your own personal knowledge.

A. Oh yes.

Q. All right. Now are any of the homes in St. Paul, without having actually measured them, are any of the homes and buildings and businesses in St. Paul within the same --

A. Range of distance.

Q. Range of flyrock.

A. Yes, this is certainly a possibility.

And yet in spite of all of this, Dr. Bartlett, looking at the so called environmental impact study, testified that none of these problems were addressed. (R, p. 62)

d) The Danger To The Ground Water Supply Of Surrounding Areas

One of the major problems of the coal field counties of Southwest Virginia is the problem of stable water supplies. Dr. Bartlett testified as to still another undiscussed, unconsidered possible environmental effect:

"A. Let me go back to your question which I didn't fully answer about the river itself. Diverting the river, we don't really know what it might do to the underground water system, and there's no mention or study of that potential for altering the underground water system. This is a possibility.

Q. All right.

A. It may either dry up or it may wet it. I don't know which.

Q. You mean it may dry up that river?

A. No, it may dry up some of the now wet fracture systems or it may wet them. It could work either way.

Q. And is there any discussion or considera-

tion of that in the environmental impact study?

A. None.

Q. As a professor, how would you grade it if you were grading it?

A. Well, I would, I would turn it back to him and say, 'Do it again,', it's so brief.

e) The Danger To The Entire St. Paul Area From The Increased Potentiality Of Significant Earthquake Activity

As if the danger of black lung, property and psychological damage from repeated seismic vibrations caused by repeated blasting, and the danger of having a 200 pound flyrock fall through their roofs and land on their dining room table (as has occurred elsewhere in Wise County as a result of blasting) weren't enough, Dr. Bartlett--a Ph.D in Geology with both academic and extensive practical experience--testified that if the project went through there was a significant possibility that the people of the St. Paul area (and indeed to a certain extent all of Wise, Russell and Scott Counties) could experience significantly increased earth tremor (earthquake) activity as a direct result of the rechannelization of the Clinch River

as it was proposed--a matter which also had been totally ignored by the so called "environmental impact study". (R, p. 67)

Thus he stated:

"Q. Is there a potential, a significant potential for environmental effects created by the fact that this fault runs right through the project zone?

A. Certainly.

* *

Q. Now, supposing that you rechannel a river into the dolomite and limestone area to the south, which has caves, would the possibility of water getting into those caves and therefore getting into the fault have any potential effect on creating more movement?

A. This is a possibility, this was really brought to light by an accidental occurrence out in Denver, Colorado about five years ago, where one of the Army nerve gas producing facilities was disposing of some of their waste products by drilling holes into the ground and then trying to let that waste material dissipate into the ground, and in doing so they watered up the fault in a sense.

Q. And had Denver had these earthquakes before?

A. They had had them only very rarely, and then they just occurred. There was a direct relationship once the geologist that was working on the project finally saw that there might be a relationship, they tested it by stopping it and

then earthquakes ceased, and they renewed it and earthquakes increased so there's a definite tie.

Q. Do they say anything about that in the environmental impact study?

A. None."

And finally, Dr. Bartlett testified:

"Q. All right, Dr. Bartlett. Now, one final question. Well, first, before I do that, do you have anything else that you noted as to the deficiencies of this environmental impact study other than what we've gone over?

A. I just, in reading it, my general observation was that it was very poor in these major aspects which should have been considered, and some alternatives that I felt like were available to them were not even considered.

Q. Can you state as an expert your opinion as to whether or not the completion of this project could or might likely cause a deleterious effect on one or more persons in the St. Paul area, either by way of dust or by way of blast damage or by way of potential problems with the faulting (sic) and so forth and so on?

A. The potential is there.

Q. All right, sir. Has that potential been considered in this environmental impact study?

A. Very little."

3. Facts relating to the projected rechannelization of The Clinch River

There is absolutely no doubt that the project involved herein envisions a major rechannelization

of the Clinch River and was primarily because of this aspect (and the desire to develop land for private housing and commercial establishments) that this project was begun in the first place. Thus, Appellee's witness, Kenneth Poore, testified:

"A. The degree of blighting influence was based on some of those elements that Mr. Siff had discussed, but predominantly the fact of flooding or potential flooding of that property. . ." (R, p. 271)

Likewise there is no doubt that the Clinch River is a navigable river under exclusive Federal jurisdiction.

4. Facts relating to the "urban blight" subterfuge for the involuntary seizure of private property in violation of your Appellants' rights to substantive due process

As stated above the town of St. Paul, Virginia, is a small rural town of less than two thousand people located in the extreme southwestern corner of rural Wise County, Virginia, and can by no stretch of anyone's imagination be thought to be "urban" in nature or to have a problem of "urban" blight.

In regard to just how much of the housing in

the project area is actually considered "blighted housing", in a letter from Mr. R. W. Poore of Harland Bartholomew & Associates outlining that consulting firm's finding concerning the St. Paul neighborhood development program (R, p. 284), Mr. Poore points out that the 62 structurally substandard buildings occupy 15.1 acres of the project area and since the project area, according to Mr. Poore's own letter, includes 96.7 acres (including the Clinch River), then by dividing the total project area into the area covered by substandard buildings, it can be seen by simple arithmetic that just over 15% of the total project area was covered by substandard housing that required or warranted clearance.[16] That letter states:

> "The project area contains 109 principal dwellings and 96.7 acres including the Clinch River. A total of 62 or 56.9% of these principal dwellings are classified as structurally substandard to a degree requiring and/or warranting clearance based on structural surveys by R. Kenneth Weeks Engineers, December 1973. The 62 structurally substandard buildings occupy 15.1 acres. . ."

[16]Additionally, the Appellants called as their own witness, Mr. Andrew J. Hargroves, whose testimony, while not in the Appendix, can be seen in the record in which he testified that the project area was not blighted as a whole.

Therefore, it can be seen from simple arithmetic that 15.1 acres is only a little bit more than 15% of the entire project area including the river. Excluding the river, simple mathematics would decree that the dilapidated structures only cover approximately 20% of the entire project area. Additionally, however, it should be noted that your Appellants have urged and argued that the housing in the project area was not blighted within the meaning of the term.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

While some of the questions raised herein are similar to questions previously decided by this Court, and the Supreme Court of Virginia (e.g. the unconstitutionality of taking private property for re-distribution for private use) the Supreme Court of Virginia either did not apply those former decisions to this case or it carved

out an exception to such constitutional guarantees which have not been previously ruled on by this Court. Other questions have never been directly decided by this Court, though in some instances there is a split in the Federal Circuit Courts which have been called on to rule on similar cases (e.g. the authority of courts to stop projects which do not have adequate environmental impact statements).

In all events, it is submitted that in a day where the power of government is so great that using the agency of government to seize private property for the purpose of ultimate distribution to other private parties is so fraught with potential for arbitrary and even fraudulent abuse and is such an anathema to the constitutional rights the ownership of private property is not only a substantial question but a question of major importance.

Likewise, when we have the technology to, like Superman, "move mountains and change the course of mighty rivers", we also have the ability

to wreck havoc with the environment. Clearly, this is true in the instant case and clearly this is what Congress intended to retrain and prevent when it passed the National Environmental Policy Act. It does no good to require an environmental impact statement if after that statement can be allowed to be merely pro forma and if the governmental agency such as the Appellee herein is going to be allowed to go right ahead[17] and carry out the project whether or not a full and complete environmental impact statement would show a substantial threat (such as new earthquake activity) to the environment if it were carried through. Likewise, it is neither constitutionally "necessary or proper" for the Appellee to condemn your Appellants' land herein if ultimately they are not going to be able to move the first stone because of the severe environmental threat.

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[17]It should be noted that insofar as counsel is advised that Federal funding for this project has been withheld and no actual work of any significant degree has taken place as far as leveling the mountain or rechannelizing the river is concerned.

All of these questions are not only substantial but are extremely important to the protection of our environment and of our heritage to own, develop and enjoy private property under the Constitution.

I.

THE COMMONWEALTH'S COURTS ERRED IN IMPLIEDLY SUSTAINING §36-49(5) OF THE 1950 CODE OF VIRGINIA WHICH, AS INTERPRETED BELOW, ALLOWS THE TAKING OF PRIVATE PROPERTY FOR PREDOMINANTLY PRIVATE USE AND PURPOSES IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The general proposition is well-settled; there can be no taking of private property except for public use. Missouri P.R. Co. v. Nebraska, 164 U.S. 403, 41 L. Ed. 489, 17 S. Ct. 130. This Federal constitutional proposition is grounded in two sources: first, public taking for private use is impliedly proscribed by the initial limitation of the enabling section of the Fifth Amendment to the Constitution, North Carolina Public Service Co. v. Southern Power Co., 282 F. 837, cert. dismissed 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164; and also by the due process clause (as made applicable to state action by the Fourteenth Amendment) of the Fifth Amendment to the Constitution, Panhandle Pipeline Co. v. State Highway Commission, 294 U.S. 613, 79 L. Ed. 1090,

55 S. Ct. 563, rehearing denied 295 U.S. 768, 79 L. Ed. 1709, 55 S. Ct. 652.

A party's case cannot rise above its own evidence. And, in the instant case, the Authority, through its own personnel, testified, without one scintilla of evidence to the contrary, that the ultimate proposed use of the land to be taken was for a private (as opposed to the necessary public) use.

Mr. Charles McConnell, the Assistant Administrator of the Wise County Redevelopment and Housing Authority stated in the course of the ore tenus hearing on August 30, 1976:

"Q. All right, sir, so let's exclude the sewage treatment plant then; let's go up here. Would you tell me what these lots are numbered--one to apparently forty-five--with roads going through and turn arounds?

A. That is a proposed subdivision.

Q. And are houses going to be built on that subdivision?

A. That is the plan, yes.

Q. And what's going to happen to these houses?

A. Hopefully they'll be built and lived in.

Q. And who will live in them?

A. The people that purchase the land and build the houses.

Q. I see. So that all of this land up in here is going to be sold back to individual owners; is that correct?

A. That is my understanding, yes."

In testimony discussing the rest of the project, Mr. McConnell pointed out that it also was intended for private use.

Thus he continued:

"Q. So that land would also be bought and used for private commercial endeavor; is that correct?

A. Yes.

Likewise, Mr. McConnell continued to testify as to all of the other lots shown on the Exhibit #2 and testified that they would all be sold to private enterprise except for a very narrow park space and for the roads that would be built to service the private lots and the commercial areas which would be sold to private enterprise. Finally, he testified:

"Q. Is there any area to the north and west of the line shown as alternate route #58 which at

the end of this project, after everything is done, will not be under the control of either private individuals or private enterprise?

A. It is hoped that it will be owned by private.

Q. All of it?

A. Except as you indicated, that open space."

In sum, Mr. McConnell admitted that except for the new roads in the project area[18] and except for the sewage plant[19] and the open spaces,[20] all

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[18]Since Mr. McConnell testified the roads in the project area which would be built by the Petitioner were solely to service newly created private residential and commercial areas and would not be necessary "but for" them, it is submitted that the so called "public roads" involved in the project and the land taken for them was ancillary for the primary private use of the land so taken and as such "but for" the unconstitutional taking for private use, there would be no reason or purpose to take for any so called "public use". It is further submitted that if the taking results primarily in private use, even though there may be some public use of the facilities constructed, then the entire taking is unconstitutional. See Phillips v. Foster, 215 Va. 543, 211 S.E. 2d 93 (1975). See also Rudee Inlet Authority v. Bastian, 206 Va. 906, 147 S.E. 2d 131 (1966).

[19]In the case of the discussion of the sewage plant, it should be noted that all of the property that was needed for that plant was taken some time ago; that the plant itself has been built and

the land in this project over which the Authority has jurisdiction or power would either be for private use and ownership or for absolutely no use planned for it as of the day of taking.

Even though the Authority has stated that their purpose is to "provide public housing for the dispossessed and poor", it is clear from the record of this case and the testimony of Mr. McConnell that that is not the purpose of the Authority. Nowhere in any of the testimony is there any discussion of any concrete plans for "public" housing. It all concerns industrial sites and/or a subdivision to be developed by a private developer for private home sites, etc.

Footnote 19, continued:

operating for some time; and, that neither this project nor this taking has anything to do with that plant. Thus, any reference to the sewage plant in the Transcript is totally irrelevant, immaterial and superfluous.

[20]As for the open spaces, the area taken for them was rather minimal and they were purely ancillary to the landscaping of the areas reserved for private use and benefit and would not be needed at all "but for the taking made for private use and benefit".

Likewise, the proposed plan prepared by the Appellee and entered as Defendant's Exhibit #2 shows no space for public housing. It is all taken up with private subdivision and commercial development and support facilities.

Similarly, there is no discussion of how the Petitioner would administer any so called public housing if there were any to administer, even though it is specifically charged statutorily with an ongoing administrative responsibility under §36-22 of the Virginia Code.

It should further be observed that the taking of this project is not, according to the testimony of the Authority's own witnesses, essential to either flood control in St. Paul or to the re-channelization of the Clinch River.

In considering the application of Federal constitutional restrictions to such a proposed condemnation goal, particularly when both the goal and the enabling legislation have been sustained by the Commonwealth's courts, emphasis must be placed on the general policy of strictly construing

the statute enabling condemnation against the condemnor and in favor of the landowner. See Hooe v. United States, 218 U.S. 322, 54 L. Ed. 1055, 31 S. Ct. 85, and Dillon v. Davis, 201 Va. 514, 112 S.E. 2d 137. The statute to be so construed is §36-49 of the Code of Virginia:

"Any authority now or hereafter established, in addition to other powers granted by this or any law, is specifically empowered to carry out any work or undertaking (hereafter called a "redevelopment project"):

(1) To acquire blighted or deteriorated areas, which are hereby defined as areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community;

(2) To acquire other real property for the purpose of removing, preventing, or reducing blight, blighting factors or the cause of blight;

(3) To acquire real property where the condition of the title, the diverse ownership of the real property to be assembled, the street or lot layouts, or other conditions prevent a proper development of the property and where the acquisitions of the area by the authority is necessary to carry out a redevelopment plan;

(4) To permit the preservation, repair, or restoration of buildings of historic interest; and to clear any areas acquired and install, construct, or reconstruct streets, utilities, and site improvements essential to the preparation of sites for uses in accordance with the redevelopment plan;

(4a) To provide for the conservation of portions of the project area and the rehabilitation to project standards as stated in the redevelopment plan of buildings within the project area, where such rehabilitation is deemed by the authority to be feasible and consistent with project objectives;

(5) To make land so acquired available to private enterprise or public agencies (including sale, leasing, or retention by the authority itself) in accordance with the redevelopment plan;

(6) To accomplish any combination of the foregoing to carry out a redevelopment plan. (1946, p. 278; Michie Suppl. 1946, §3145(8b); 1962, c. 336; 1972, cc. 466, 782.)"

This statute, as applied to the proposed condemnation in the case at bar, where 75% of the project area is for private use and much of the remainder is underwater, unwarrantedly extends the exercise of the eminent domain power beyond the public use limits imposed by Federal constitutional law.

The limitation of the exercise of eminent domain for public uses only has been variously defined. Two approaches predominate. The stricter definition holds that a public use means that the property must be used or employed by the public at large. U.S. ex. rel. Tennessee Valley Authority v. Welch, 150 F. 2d 613, reversed on other grounds

327 U.S. 546, 90 L. Ed. 843, 66 S. Ct. 715, provides an example of this stricter interpretation. The Tennessee Valley Authority attempted to condemn land in order to discharge its liability arising from their proposal to flood it in the course of their operations. The Court blocked the attempt, quoting with approval the language of an earlier case, Bloodgood v. Mohawk and Hudson River Co., 18 Wend, N.Y. 9, 31 Am. Dec. 313, 356:

> "When we depart from the natural import of the term 'public use' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term 'public improvement' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded and we permit ourselves to be governed by speculations, upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us * * *."

Clearly, the project at bar fails to qualify as a public use under this stricter definition.

As was stated in 26 Am Jur 2d Eminent Domain §27:

> "One line of decisions holds that public use means use by the public--that is, public employment-- and consequently that to make a use public, a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and that there must be a right on the part of the public, or some portion of it, or some public or quasi-public agency on behalf of the public, to use the property after it is condemned."

While it is true that there has been another line of cases which defines "public use" more liberally,

> "The trend of authority seems to be away from any general definition of the term "public use" as synonymous with "public benefit", and toward restriction thereof . . ."

Op. Cit., p. 675; See also, Nash v. Clark, 27 Utah 158, 75 P. 371 aff'd 198 U.S. 361, 49 L. Ed. 1085, 25 S. Ct. 676; Brown v. Gerold, 100 Me. 351, 61 A. 785; Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 N.W. 857; Phillips v. Foster, 215 Va. 543, 211 S. E. 2d 93 (1975).

And the Supreme Court of Virginia has itself adhered to the stricter definition of "public use":

> The salient consideration is not whether a public benefit results but whether a

> public use predominates. "Public use" and "public benefit" are not synonymous terms. Richmond v. Carneal, 129 Va. 388, 393, 106 S.E. 403, 405 (1921). It is of no importance . . ."that the public would receive incidental benefits such as usually spring from the improvement of lands of the establishment of private enterprises: The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agency; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on the vague grounds of public benefit to spring from the more profitable use to which the latter may be devoted." 2 Cooley's Constitutional Limitations, 1126-1129 (8th Ed. 1927).

Phillips v. Foster, 215 Va. 543, 211 S.E. 2d 93, 96 (1975).

In no sense can the Authority's project be considered a public use under this interpretation. The intended goal is the development of a private housing subdivision and a private industrial park. The only public use not already completed is the construction of roads incidental to the private uses. Development of the home and industrial sites will be contracted to a private developer.

Even were this Court to apply a more liberal public use standard, the lack of necessity and prevalance of alternatives to the Authority's

proposed project dictate close examination of the degree to which public purpose predominates over private use. And only where private benefit was incidental to public benefit has condemnation been sustained under this interpretation. See, e.g. Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 50 L. Ed. 581, 26 S. Ct. 301.

The Authority proposes to embark on a program of private residential and industrial development. Of itself, such a plan is not objectionable. But when the Authority proceeds by forced condemnation rather than by voluntary sales, it does so in gross violation of the Petitioners' right to due process. And where the courts of the Commonwealth, having previously ruled that the necessity of showing a public use could not be met by a mere demonstration of an attenuated public benefit, sustain the validity of this project, error has been committed and the denial of Petitioners' due process is grievously compounded.

II.

THE TRIAL AND APPELLATE COURTS OF THE COMMONWEALTH COMMITTED ERROR BY IGNORING THE PREEMINENT REQUIREMENTS FOR AND SUBSTANTIAL SAFEGUARDS OF AN ENVIRONMENTAL IMPACT STATEMENT CONFORMING TO FEDERAL STATUTORY GUIDELINES

a. Federal participation in this project, in the form of funding by the Department of Housing and Urban Development, constitutes "major Federal action significantly affecting the quality of the human environment", for which an environmental impact statement conforming to Federal regulations is required.

The Authority's proposed redevelopment scheme is to be partially funded by a multimillion dollar grant from the Federal Department of Housing and Urban Development. This sort of funding support, as case law amply substantiates, requires the preparation of an environmental impact statement because such projects constitute "major Federal action" under the terms of 42 U.S.C. §4332(2)(c):

> "(2) all agencies of the Federal Government shall. . . . .
>
> (c) include in every recommendation or report or proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement. . ."

Funding support from Federal sources has generally been held to provide the requisite Federal nexus even where that support, unlike the case at bar, is not in the form of a direct grant. Sierra Club v. Lynn, 502 F. 2d 43 (Texas 1974); rehearing denied 504 F. 2d 760; certiorari denied 95 S. Ct. 2001, 2668, 421 U.S. 994, 44 L. Ed. 2d 484; rehearing denied 96 S. Ct. 158, 423 U.S. 884, 46 L. Ed. 2d 115, for example, merely involved H.U.D.'s guarantee of eighteen million dollars in land obligations rather than a direct dollar grant. The Circuit Court held that even this indirect support was major Federal action within the meaning of the statute. Sierra Club v. Lynn, 502 F. 2d 43, 57-58 (1974).

The Cane Creek Improvement Project, a one-million dollar recreational development scheme with fifty-five percent of the funding provided by the Federal Department of Agriculture, furnishes an example of a directly funded project more analogous to the case at bar. Part of a larger

H.U.D. model cities program, this project was held to be major federal action because it involved "substantial planning, time, resources or expenditure". Smith v. City of Cookeville, 381 F. Supp. 100, 112, 109 (M.D. Tenn. 1974), citing Citizens Organized to Defend Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-367, (E.D.N.C. 1972).

A second aspect of the larger statutory requirement is that the activity be one "significantly affecting the quality of the human environment". 42 U.S.C. §4332(2)(c). Even the proposed demolition of a single city block in Philadelphia has been held to have "manifold effects upon the environment mak[ing] it an action 'significantly affecting the quality of the human environment'". Sansom Committee v. Lynn, 382 F. Supp. 1242, 1245 (E.D. Pa. 1974). Obviously, a project such as contemplated by the Authority in the case at bar, involving one hundred acres, the leveling of a mountain, and the rechannelling of a river,

would also have a "significant" affect upon the environment.

There can be little question, then, as to the necessity of preparing an adequate environmental impact statement conforming to Federal statutory requirements.

b. In this case, the environmental impact statement prepared by H.U.D. failed to meet the requirements of 42 U.S.C. §4332(2).

The broad divisions of an adequate environmental impact statement are noted at 42 U.S.C. §4332(2)(c) as necessitating "detailed statements" as to:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The environmental impact statement filed in the case at bar is deficient in each of these divisions.

As already detailed in the Statement of Facts, the environmental impact statement failed to consider the following adverse environmental effects, thereby ignoring the demands of (i) and (ii) of 42 U.S.C. §4332(2)(c):

1. The blasting required to level the ridge contained in the project area would create dangerous levels of localized particulate air pollution;

2. This blasting would also create extensive ground vibration in and around the project areas with potentially serious effects on the psychological well-being of area inhabitants;

3. A third result of blasting is presented by the danger of flyrock, with obvious potential for "adverse" impact on the human environment;

4. Rechannelization of the Clinch River may have a deleterious effect on groundwater supplies and flows to the detriment of the local environment; and

5. The development of seismic activity which could result from the Clinch River diversion's effect on the major fault underlying the project area.

In these same particulars, neither alternatives to the proposal (as required by subsection

iii) nor the productivity tradeoff (as required by subsection iv) were discussed.

Also not adequately discussed are the "irreversible" results of the scheme's proposal of leveling a ridge and rerouting a river.

In brief, the environmental impact statement is an inadequate instrument, unable to bear the burden of satisfying the legitimate Federal environmental concern embodied in the broad requirements of 42 U.S.C. §4332.

c. Error has been committed by the trial and appellate Courts of the Commonwealth by sustaining the Authority's right to proceed with its development project despite its failure to prepare an adequate environmental impact statement.

In enacting the National Environmental Policy Act (42 U.S.C. §§4331-4374), Congress declared a legitimate Federal interest in environmental quality and recognized that adequate environmental impact statements are an important bulwark in maintaining environmental quality. Judicial enforcement of these standards has taken different forms. In Scottsdale Mail v. State of Indiana,

418 F. Supp. 296 (Ind. 1976), District Court established, albeit in dicta, that Federal funds for a highway project could be blocked until "all the procedural requirements" of an adequate environmental impact statement were met.

And in Citizens for Clean Air, Inc. v. Corps of Engineers, U.S. Army, 349 F. Supp. 696 (N.Y. 1972), the court invalidated the Army's grant of a permit to a power utility for the construction of a cooling system for a proposed power plant where an adequate environmental impact statement was not prepared. As Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F. 2d 1079, (D.C. 1973) notes as to the importance of preparation and distribution of an adequate environmental impact statement:

"These procedural requirements are not dispensable technicalities, but are crucial if the statement is to serve its dual functions [1] of informing Congress, the President, other concerned agencies and the public of the environmental effects of agency action and [2] of ensuring meaningful consideration of environmental factors at all states of agency decision making."

Appellant landowners respectfully submit that the trial and appellate courts heretofore

have viewed the requirements of this Federal statute as mere "dispensable technicalities", and seek redress from this Court both for themselves and for the public.

III.

THE SUPREME COURT OF VIRGINIA AND THE TRIAL COURT BELOW ERRED IN UPHOLDING, BY IMPLICATION, THE CONSTITUTIONALITY OF §36-48(1) AND §36-49 OF THE CODE OF VIRGINIA TO THE EXTENT THAT THEY ALLOWED A LOCAL AGENCY TO CONDEMN PRIVATE PROPERTY FOR A LOCAL PROJECT WHOSE ONLY REAL PUBLIC PURPOSE WAS THE RECHANNELIZATION OF THE CLINCH RIVER (A NAVIGABLE WATER BY STIPULATION) AND WHERE THE FEDERAL GOVERNMENT HAS PREEMINENT CONTROL OF NAVIGABLE WATER UNDER ARTICLE I, §8 OF THE CONSTITUTION AND TITLE 33 OF THE UNITED STATES CODE.

Inherent in its constitutional power to regulate interstate commerce, the federal government has preeminent jurisdiction over navigable waters. By stipulation, by historical usage, and by its physical characteristics, the Clinch River is a navigable stream subject to Federal control. See, e.g. The Daniel Ball, 77 U.S. 557 (1871).

The proposed diverting of the Clinch River would temporarily obstruct it, and it has not been established that the rechannelization of this river would not result in a permanent obstruction of its navigable capacity.

Federal statute required express Congressional

approval of projects likely to create such an obstruction:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of the waters of the United States is prohibited;. . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity . . . of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army [said functions having been since transferred to the Department of Transportation by 49 U.S.C. §1655(g)(6)(A)] prior to beginning the same.
> (33 U.S.C. §403)

Congressional legislation has not been obtained. Administrative approval of the river's rechannelling has been withheld. Accordingly, state court approval of the project was premature, and preeminent Federal concerns have been shunted aside.

Petitioners respectfully submit that such premature approval, where administrative prerequisites have not been satisfied, constitutes error on the part of the Commonwealth's courts and is in violation of the Federal government's preemptive right to control navigable waters. Moran

v. New Orleans, 112 U.S. 69, 28 L. Ed. 653, 5 S. Ct. 38 (1884).

IV.

THE VIRGINIA TRIAL AND SUPREME COURTS ERRED IN IMPLIEDLY HOLDING THAT §36-48.5 AND §36-49 OF THE 1950 CODE OF VIRGINIA AS AMENDED WERE CONSTITUTIONAL UNDER THE SUBSTANTIVE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE EXTENT THAT AS APPLIED HEREIN THEY ALLOWED THE INVOLUNTARY SEIZURE OF PRIVATE PROPERTY SUPPOSEDLY UNDER THE GUISE OF URBAN BLIGHT, WHEN THE ACTUAL PROJECT AREA EXISTS IN A RURAL SETTING AND WHERE THE MAJORITY OF THE PROJECT AREA IS UNDEVELOPED MOUNTAINSIDE AND RIVERBED OR BOTTOM WHERE SUCH SEIZURE CONSTITUTES AN INFRINGEMENT OF YOUR APPELLANTS' CONSTITUTIONAL RIGHTS TO HOLD AND ENJOY PRIVATE PROPERTY FREE FROM UNNECESSARY GOVERNMENTAL COMPETITION AND RESTRICTION.

a. While the project in the case at bar was planned and will be carried out as a so-called redevelopment and housing authority with federal monies designated for urban slum clearance, the project area is in fact in a very small rural town which had no rational basis or need to ever be "redeveloped" and therefore the Commonwealth of Virginia and its local agencies had no rational basis for using the power of eminent domain and ultra sophisticated big city slum clearance methods for any minimal rural blight that might exist here along with many, many other similar coal miners' homes in Southwest Virginia.

As has been set forth in the FACTS, supra,

St. Paul, Virginia, is a small, rural southern town in the extreme southeastern corner of rural Wise County,[21] with a total population of less than 2,000 people.

While the reasons for slum clearance in large urban areas are all well known and accepted as such things as high intensity population leading to poor moral and health standards, too high fire risks, and too high crime rates, with little building maintenance and vandalism due to absentee landlords and general conditions which go with, and are deleterious to, areas of high intensity population, the project area in the instant case was hardly such a place. St. Paul is not a city of heavy and intense population concentrations. Multi-family residential units subject to the abuses of absentee ownership, poor maintenance,

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[21] It is interesting to note that St. Paul is such a small rural town that before Appellee could even begin the project it had to annex "South St. Paul" which lay across the river in another county (and had so few people that it wasn't even an incorporated town) in order to gain jurisdiction over a majority of the project area.

and non-caring tenants is not only not the rule there, it is almost unheard of, and nowhere in the record is there any evidence that it is.

While a little over one half-of the homes on just 15% of the project area may not have been up to our modern day suburban standards (primarily because of such so called "structural" deficiencies as no indoor toilets in an area which just months before had no public sewage available for indoor toilets to hook onto and other similar "blight") in most cases such so called "blighting conditions" could have been readily rectified by easily available alternatives[22] such as simply requiring that the property owners tie on to the newly built public sewage plant which was already "on line"

[22] According to 42 U.S.C.§4332(2)(c)(iii) such alternatives must be considered in any case of environmental impact in any major federal action. See pp. 60 & 61 supra.

in the immediate vicinity[23] and the cost of which to property owners who could not otherwise afford such improvements could have been made much more readily through the use of H.U.D. or Farmer's Home Administration (F.H.A.) home improvement loans and/or grants.

While a very few such homes had minor structural deficiencies such as rotting wooden poarches, a lack of paint and the like, these matters could have been readily handled in an area such as St. Paul, by local encouragement of clean up, fix up and paint up campaigns as is done all the time in small towns throughout Southwestern Virginia and, indeed, throughout rural America.

As far as other so called (urban) "blight" such as the steepness of terrain

[23] see pp. 48 & 49, fn 19 supra, see also Hutchinson v. City of Valdosta, 227 U.S. 303 (1913).

and the flat areas being subject to periodical flooding, these are conditions which (along with somewhat slightly substandard housing) exists universally throughout rural Wise County, Virginia, and all of the mining areas of Southwestern Virginia. If this Court allows Virginia Courts to consider these conditions in the project area as evidence of urban blight so as to give local governmental agencies the right to take over private property and to use Federal public money to develope (NOT RE-DEVELOP) it and then to sell it to other private interests as is occurring herein, then it will be allowing such local authorities practically absolute carte blanche to take property away from one owner (especially those in the lower economic brackets) and to reinvest such property on others (who have the money to buy the land at inflated prices and to build nice new homes and commercial

establishments thereon).

It is respectfully submitted that such power did not even exist in absolute monarchs operating under feudal relationships in the middle ages. It is further respectfully submitted that if this be constitutional, "as power corrupts and absolute power corrupts absolutely", so will local governments be sorely tempted to make many more such "land grabs" from those that are not favored and to make available such land for their own favored few, and any idea of the people being secure in their ownership of private property would be a thing of the past.

b. If the standards as used herein to define "urban blight" under §36-49 of the 1950 Code of Virginia are held constitutional, then your Appellants will be the subject of arbitrary and invidious discrimination in violation of the equal protection and substantive due process guarantees of the Fourteenth Amendment to the United States Constitution.

If the standards which were used in the instant case to define "blight" under

Title 36 of the Code of Virginia are allowed to stand then there will, in effect, be no standards for distinguishing blighted areas anywhere in Southwestern Virginia since the conditions of steep sided hills and flood prone valleys dotted with coal miners' homes are the norm throughout the Southwestern Virginia coal fields. The conditions which were described as being the basis for declaring the project area as "blighted" exist in every village, town and hamlett and up every hollow and along every ridge in Wise County and all of Southwestern Virginia. They are conditions which naturally come with the terrain, and they are conditions which the people who live there accepted when they moved there or continued to live there.[24]

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[24]It is interesting to note that unlike big city slums, many coal miners' children who have not liked these conditions have moved out in past decades and many others are moving in today because

If the Virginia Courts' interpretation of Title 36 (and specifically §36-49) is allowed to stand as interpreted herein, then there will be no standards for deciding whose property will be subject to such local land grabs by local big wigs using large amounts of federal moneys and whose will not. Thus, as in the case of your Appellants herein, property can and will be taken subject solely to the arbitrary and capricious whims of such local politicians. All they will have to do is to "paper up" the right resolutions, have an engineering or consulting firm come in and see the particular "steep terrain" and "flood prone" valleys, and occasional unpainted or otherwise "structurally deficient" disabled coal miner's home and certify it as a "blighted"

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fn. 24 cont'd.
this type of of country and terrain allows the "return to nature" and "down home style living" that many want today.

area and this is true not only in Southwestern Virginia but throughout the Appalachian South, and such other areas as the Ozarks, etc., so it is truely national significance.

It is respectfully submitted that this is exactly what was done in the instant case.

Thus, in a case very similar to the case at bar, Myles Salt Co. Lt. v. Board of Commissioners, 239 U.S. 478, 60 L.Ed. 392, 36 S. Ct. 204 (1916) where the State of Louisiana had properly set up drainage districts and local boards of commissioners to administer them but the local board had included land in a district solely to obtain income from it, this Court held that such power could not be arbitrarily exerted and if it was it amounted to unconstitutional confiscation violating the (substantive) due process provisions of the Fourteenth Amendment.

c. While the concept of "substantive due process is no longer considered with the force that it had some years ago, it is respectfully submitted that the constitutional safeguards of the Fourteenth Amendment still guarantee your Appellants and the people of this country the right to own and enjoy private property without being in constant fear of the use of unwarranted and unbridled state and local police powers to simply seize private property for the empire building of some land grabbing local politician.

The concept of substantive due process is, essentially, a method by which the courts exercise the ultimate decision whether a particular subject appropriately can be regulated by the State's police power,[25] and while the Courts have retreated somewhat from referring to the guarantee of substantive due process out of an unwillingness.

> ...on the part of the courts to play the essentially legis-

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[25] See Howard, Commentaries on the Constitution of Virginia, Vol. I, p. 194, University Press of Virginia, Charlottesville 1974; See also: Lochner v. New York, 198 U.S. 45 (1905)

> lative role of making certain economic, political and social judgments.[26]

it is clear that the courts and particularly this court will not only invoke substantive due process safeguards when it is clear that as applied the legislative action has overstepped all limits of our constitutional guarantees of the rights of privacy and/or the rights to own and enjoy private property, but that they have a clear duty to do so.

Thus, this Court held in Ohio v. Helvering[27]

> "Nevertheless the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. Rippe v. Becker, 56 Minn. 100, 111, 112, 57 N.W. 331, 22 L.R.A. 857. If a state chooses to go into the business of buying and selling...[property] its right

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[26] Ibid.

[27] 292 U.S. 360, 54 S.Ct. 725, 78 L. Ed. 1307

> to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power.

Similarly, while not actually using the words "substantive due process" the Supreme Court of Virginia has, in several fairly recent instances invoked the concept.

Thus, in the case of Bristol Redevelopment and Housing Authority v. Denton 198 Va. 171, 93 S.E. 2d 288 (1956) the Virginia high court held:

> "Thus, the condition of an area is the very basis of the jurisdiction and power of a redevelopment authority to acquire property located therein by eminent domain...Unless the area meets this definition the authority has no power to acquire it and the council has no basis for the approval of such taking. In this situation, the court has the right to determine whether the area is in fact 'blighted or deteriorated' as defined in the statute. Code §36-49(1)."

and when, in Denton, the Bristol Redevelopment and Housing Authority argued that it had power under §36-49(3)[28] of the Code of Virginia to condemn property the Virginia court held:

> "We need not stop to consider whether ¶3 is intended to empower the acquisition of property in an area merely as incidental to the primary purpose of eliminating blighted or deteriorated conditions in the area, or independently of that purpose. If the latter be the intent of the paragraph, then a serious question arises as to whether despite the declaration of §36-48(c), the taking

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[28] That section allows condemnation

> (3) To acquire real property where the condition of the title, the diverse ownership of the real property to be assembled, the street or lot layouts, or other conditions prevent a proper development of the property and where the acquisitions of the area by the authority is necessary to carry out a redevelopment plan;

> of property to eliminate the conditions there specified constitutes a taking for 'a public use and purpose'."

Yet, in the instant case, diverse ownership of lands, and other items were mentioned as so called "blighting conditions" on which the Appellee herein claimed the right to seize this land. See also Phillips v. Foster, 211 S.E. 2d 93 (S. Ct. Va. 1975) and Rudee Inlet Authority v. Bastian, 147 S.E. 2d 131 (S. Ct. Va. 1966).

It is interesting to note that in its opinion below the Virginia Supreme Court utterly failed to discuss the Denton case in this regard even though it was clearly discussed in Appellants' brief. Thus, while recognizing the constitutional concept in Denton, they failed to apply it in Rudder (and thereby committed reversable error.)

CONCLUSION

For the reasons stated above and

primarily for the reasons: (1) that the Virginia courts committed error when they upheld the constitutionality of §36-49(5) of the Virginia Code as it was interpreted to allow the taking by eminent domain of private property for predominantly private use in violation of the equal protection and due process clause of the Fifth and Fourteenth amendments; and (2) that the Virginia courts committed error when they superimposed Virginia condemnation statutes over predominant federal laws calling for substantial and accurate environmental studies safeguards where there is a major federal envolvement and especially where there is a very real threat of severe environmental harm if the project goes through;[29] and, (3) that the

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[29]--a harm so great that statutes allowing for such a project to go through could be arguably unconstitutional as a violation of the provision against taking life and property without notice and compensation.

Virginia courts committed error in actually and/or impliedly upholding the constitutionality of §36-48.5 and §36-49 of the Code of Virginia over a challenge to their constitutionality based on the contention that, as interpreted in the instant case, they allowed the involuntary seizure of private property when the supposed reason for such seizure, i.e., urban redevelopment, was nothing more than a pure sham to take essentially undeveloped rural property which was no more "blighted" than 80% of the rest of the terrain in Wise County and the Southwestern Virginia coalfields so that the property could be "developed" by the use of federal moneys and then re-distributed to favored private interests in violation of your Appellants' constitutional rights to substantive due process.

As was stated above under the heading "SUBSTANTIALITY OF FEDERAL QUESTIONS" pp 42-44, it is respectfully submitted

that the issues presented for appeal herein are extremely serious and important in protecting the rights of your Appellants and, indeed, of millions of other Americans similarly situated in rural America because any move to grant governmental agencies the right to what would be (if the opinion) below is to stand) essentially unbridled power to seize private property and to redistribute it to favored individuals and corporations, would seriously change the very fabric of our constitutional heritage to equal protection, due process, and the rights to own and enjoy private property without unwarranted and unbridled government interference.

It would also have the effect of decimating the Congressional intent in regard to the purposes stated by the National Environmental Protection Act since it would allow any local project to get around that act by simply condemning

private land in state courts.[30]

Finally, it is respectfully submitted that if there were ever such a right as the right to substantive due process the Virginia courts have violated it by their allowing the Appellee to condemn land for this project under such loose interpretations of Title 36 of the Virginia Code as discussed above and this is an exceptionally good case to reconfirm and redefine that right in the light of today's governmental structure and technology.

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[30]It is respectfully submitted that indeed this may be the very reason that the Appellee herein condemned the property for this project--because the Federal Agency that might have properly done so for the rechannelization (T.V.A.) knew it could not do so under the restrictions of that Act because the federal courts could be expected to enforce federal law.

Respectfully submitted,

SKAGGS RUDDER, ET. AL.

By Counsel

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William H. Robinson

Robert Austen Vinyard

CERTIFICATE OF SERVICE

I hereby certify that a zerox copy of the foregoing was mailed to J. Robert Stump, Esquire, at his office at Norton, Virginia, on Thursday, March 29, 1979, and that the printer has been instructed on the same date to send him the requisite number of printed briefs.

S. Strother Smith, III

THIRTIETH JUDICIAL CIRCUIT
Counties of Lee, Scott and Wise
City of Norton

Judges:
JOSEPH N. CRIDLIN (ret.)
Jonesville, Virginia
M. M. LONG, JR.
St. Paul, Virginia

December 17, 1976

Mr. Robert Stump
Attorney at Law
464 Park Avenue
Norton, VA 24273

Mr. S. Strother Smith, III
Attorney at Law
117 West Main Street
Abingdon, VA 24210

RE: Wise County Redevelopment and Housing Authority vs. Skaggs Rudder, et ux

Gentlemen:

Upon the commencement of this action in which the petitioner seeks to condemn certain property of the defendants, the defendants urged its dismissal upon the grounds set forth in their answer filed on May 13, 1976.

The motions, briefly stated, contend that: (1) the petitioner is not a duly constituted political subdivision of the Commonwealth of Virginia and has not been duly and properly created pursuant to the laws of the Commonwealth; (2) that the petitioner does not have the constitutional authority to condemn private property;

(3) that petitioner is seeking to condemn private property for private use; (4) that the area sought to be condemned is not located in a blighted area; (5) that a proper environmental impact study has not been made.

These motions were taken under advisement by the Court and the condemnation proceeding was heard by commissioners, resulting in an award to defendants of $65,090.00.

Exceptions were taken to the Commissioner's Report by the defendants and filed on the 21st day of September, 1976. The Court heard counsel on this motion and has heretofore overruled the same.

The Court has now reviewed the evidence which pertains to the motions to dismiss. Excellent briefs pertaining to the law and evidence prepared by counsel have been received.

The Court finds:

1. That the petitioner is legally constituted and has the power of eminent domain; that the petitioner has the legal right to exercise the power of eminent domain for the purposes set forth in the petition and the evidence in this case; that the taking of defendants property by petitioner is for public use and not in violation of the Constitution of the United States or the Constitution of Virginia.

2. That the area in which the defendants property is located and described in the petition and record in this case is a blighted area.

3. That an adequate environmental impact study has been made of the area in which the defendants property is located.

It is the opinion of the Court that all motions set forth in the answer of defendants filed May 13, 1976 and such other motions seeking dismissal of this proceeding upon the grounds set forth in the record should be overruled.

Counsel will prepare a final order in this case consistent with the finding of the Court set out above. The order shall be endorsed by counsel and submitted for entry prior to December 31. 1976.

Very truly,

/s/ Joseph N. Cridlin

Joseph N. Cridlin
Judge

JNC/scb

VIRGINIA:

IN THE CIRCUIT COURT FOR WISE COUNTY

WISE COUNTY REDEVELOPMENT
AND HOUSING AUTHORITY — PETITIONER

VS:

SKAGGS RUDDER
AND
WILMA L. RUDDER, HIS WIFE
Route 1
Bluff City, Tennessee

PARCEL NO. 30 and 31

Block No. 2

Fee Simple Title to all those certain lots, pieces or parcels of land situated in the Riverside Addition to the Town of St. Paul, Wise County, Virginia, and being lots numbered six (6), seven (7), eight (8), nine (9) and ten (10) in Block four (4) and lots six (6) seven (7), eight (8), nine (9) and ten (10) in Block Six (6) as shown on a map of the Riverside Addition to the Town of St. Paul — DEFENDANTS

This day came Petitioner, Wise County Redevelopment and Housing Authority, by counsel, and also came the defendants, Skaggs Rudder and Wilma L. Rudder, in person and by counsel, and the Report of the Commissioners to fix the fee simple

value of the defendants' lands to be taken herein, having been filed herein upon the 17th day of September, 1976, and exceptions having been filed, argued and overruled, and it appearing to the Court that said Commissioners did ascertain the fee simple value of the land to be taken to be SIXTY-FIVE THOUSAND NINETY ($65,090) DOLLARS, it is ADJUDGED and ORDERED that said report be, and the same hereby is, approved and confirmed.

On consideration of all of which, the Court doth confirm unto the Wise County Redevelopment and Housing Authority title to said lands described more particularly as follows, to-wit:

PARCEL NO. 30 and 31, BLOCK NO. 2
Fee Simple Title to all those certain lots, pieces or parcels of land situated in the Riverside Addition to the Town of St. Paul, Wise County, Virginia, and being lots numbered six (6), seven (7), eight (8), nine (9) and ten (10) in Block four (4) and lots six (6), seven (7), eight (8), nine (9) and ten (10) in Block six (6) as shown on a map of the Riverside Addition to the Town of St. Paul.

Being those same certain lots, pieces or parcels of land heretofore conveyed unto Skaggs Rudder by deed dated the 28th day of December,

1948, from Wilma L. Rudder, which said deed was recorded in the Clerk's Office of Wise County, Virginia, in Deed Book 355, page 79, etc., reference to which said deed is hereby made for a more particular description hereof.

It is further ORDERED that the Petitioner pay unto the Clerk of this Court the amount ascertained by the Commissioners as just compensation for the land and properties to be taken above described, and it is further ORDERED that all liens, by way of taxes, judgments, deeds of trust, or otherwise, upon said property or estate or interest therein, are hereby transferred to said funds and out of said funds, the Clerk is directed to make the following disbursements:

(1) Skaggs Rudder and Smith, Robinson & Vinyard, his attorneys $65,090.00

NOTE: No further liens, judgments, etc.

It is further ORDERED that the necessary court costs of these proceedings to this date be taxed by the Clerk of this Court and paid by Petitioner, said costs shall include the following:

Clerk (recording in Deed Book) $ 8.00

Commissioners:

1.	Arthur Deel	20.00
2.	Bud Clark	20.00
3.	Haskell Swiney	24.00
4.	Roger Barker	14.00
5.	Jack Kibler	24.00
6.	James P. Brooks	14.00
7.	Robert Belcher	10.00
8.	Richard Shupe	20.00
9.	Tate Skeens	10.00
	TOTAL	$164.00

It is hereby ORDERED that the Petitioner pay the aforesaid total amount to the Clerk of the Circuit Court of Wise County, Virginia, who in turn shall disburse the funds and monies accordingly as above set forth.

A copy of this Order shall be spread in the current deed book in the Clerk's Office of Wise County, Virginia, and indexed in the name of Skaggs Rudder and Wilma L. Rudder, his wife, as grantors, and Wise County Redevelopment and Housing Authority as grantee.

It is further ORDERED and DECREED that all motions, preliminary issues, jurisdictional issues and constitutional issues herein raised by

the defendants are overruled, and the Court does further decree that the petitioner is legally constituted and has the power of eminent domain; that the petitioner has the legal right to exercise the power of eminent domain for the purposes set forth in the petition and the evidence in this case; that the taking of defendants property by petitioner is for public use and not in violation of the Constitution of the United States or the Constitution of Virginia; that the area in which the defendants' property is located and described in the petition and record in this case is a blighted area; that an adequate environmental impact study has been made of the area in which the defendants' property is located.

And the Respondent, having excepted to the rulings of the Court, and having indicated that he intends to appeal the award and all jurisdictional rulings to the Supreme Court of Virginia, it is further ordered in accordance with the Rules of Appellate Procedure that all exhibits and transcripts filed herein be approved

and made a part of the record on appeal including:

1) The original Petition and Answer herein;

2) The Transcript of the Hearing of August 26, 1976 consisting of 84 pages and all exhibits filed at that hearing;

3) The Transcript of the Hearing of August 30, 1976, consisting of 154 pages and all exhibits filed at that time;

4) The Transcript of the Hearing of September 13, 1976 consisting of 73 pages and all exhibits filed at that time.

5) The Transcript of the Hearing of September 17, 1976 consisting of 150 pages and all exhibits filed therewith; and

6) Exceptions to the findings of the Commissioners; and

7) The Transcript of the Hearing of November 15, 1976 consisting of 18 pages.

Nothing further appearing necessary to be done in this proceeding, the same is hereby ORDERED to be stricken from the Docket.

Enter this Order this _____ day of December, 1976.

/s/ Joseph N. Cridlin
JUDGE

SEEN AND REQUESTED:

/s/ J. Robert Stump
COUNSEL FOR PETITIONER

SEEN AND EXCEPTED

/s/ S. Strother Smith, III
COUNSEL FOR DEFENDANTS

SUPREME COURT OF VIRGINIA

Skaggs Rudder and
Wilma Rudder, Plaintiffs in error,

against Record No. 770582

Wise County Redevelopment
and Housing Authority, Defendant in error.

From the Circuit Court of Wise County

CERTIFICATE

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, I, Howard G. Turner, Clerk of the said Court, do hereby certify that a writ of error and supersedeas was awarded on September 22, 1977, to a final order entered by the court below on December 30, 1976, in the suit therein depending under the short style of Wise County Redevelopment and Housing Authority v. Skaggs Rudder, et al.

Supersedeas bond is required in the penalty of $1,000.00 in conformity with Code, §8-477, and within the time allowed by Code, §8-489.

This certificate, constituting the summons on appeal, was this day mailed to the court

below and to

S. Strother Smith, III, 117 West Main Street,
Abingdon, Virginia 24210
William H. Robinson, 117 West Main Street,
Abingdon, Virginia 24210
Robert T. Copeland, 117 West Main Street,
Abingdon, Virginia 24210

Counsel for Plaintiffs in error

J. Robert Stump, 464 Park Avenue, Norton,
Virginia 24273

Counsel for Defendant in error

Given under my hand this 23rd day of September, 1977.

/s/ H. G. Turner

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 22nd day of September, 1977.

Skaggs Rudder, et al., Plaintiffs in error,

against Record No. 770582

Wise County Redevelopment and Housing Authority, Defendant in error.

From the Circuit Court of Wise County

Upon the petition of Skaggs Rudder and Wilma L. Rudder a writ of error and supersedeas is awarded them to a final order entered by the Circuit Court of Wise County on the 30th day of December, 1976, in a certain condemnation proceeding then therein depending, wherein Wise County Redevelopment and Housing Authority was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said court below in the penalty of $1,000.00, with condition as the law directs.

A Copy,

Teste:

/s/ H. G. Turner

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 22nd day of November, 1978.

Skaggs Rudder and
Wilma L. Rudder, Plaintiffs in error,

against Record No. 770582

Wise County Redevelopment
and Housing Authority, Defendant in error.

Upon a writ of error and supersedeas to a final order entered by the Circuit Court of Wise County on the 30th day of December, 1976.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the final order appealed from. Accordingly, the order is affirmed. The plaintiffs in error shall pay to the defendant in error thirty dollars damages and the costs expended herein.

This order shall be certified to the said circuit court.

A Copy,

Teste:

/s/Allen L. Lucy

Clerk

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief - Code, §14.1-182-not to exceed $200.00	?

Teste:

/s/ Allen L. Lucy

Clerk

Present: All the Justices

SKAGGS RUDDER AND
WILMA RUDDER

OPINION BY JUSTICE GEORGE B. COCHRAN

-v- Record No. 770582

November 22, 1978

WISE COUNTY REDEVELOPMENT
AND HOUSING AUTHORITY

FROM THE CIRCUIT COURT OF WISE COUNTY
Joseph N. Cridlin, Judge

In this condemnation proceeding the Wise County Redevelopment and Housing Authority sought to acquire certain real property of Skaggs Rudder and his wife located within the project area of the St. Paul Neighborhood Redevelopment Project.[1]

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[1]Code § 36-49 (Repl. Vol 1976) provides in part as follows:

"Any authority now or hereafter established in addition to other powers granted by this or any law, is specifically empowered to carry out any work or undertaking (hereafter called a 'redevelopment project'):

"(1) To acquire blighted or deteriorated areas, which are hereby defined as areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are

Under the Project, approved by the Town of St. Paul and by the County of Wise, the Authority proposed to acquire all land within the project area of 96.7 acres, including a portion of the Clinch River. All structures on the land would be demolished, the Clinch River would be rechanneled by the Tennessee Valley Authority (TVA) to prevent flooding, a four-lane highway, Alternate Route 58-A, would be constructed by the Virginia Department of Highways, and the remainder of the land would be resold for redevelopment for residential and commercial purposes.

The Rudders' answer to the petition for condemnation was treated as a motion to dismiss. In it the landowners challenged the Authority's right

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[1]Continued

detrimental to the safety, health, morals or welfare of the community;

"(2) To acquire other real property for the purpose of removing, preventing, or reducing blight, blighting factors or the cause of blight;

" . . . . "

to condemn their property, asserting, inter alia, that the project area was not blighted, that a proper environmental impact study was required but had not been prepared, and that the proposed taking was unconstitutional because the land was later to be resold to private individuals. Evidence on the motion to dismiss was presented in ore tenus hearings and by deposition, but the trial court did not rule on the motion until the hearing before the condemnation commissioners had been completed and the report by the commissioners awarding the Rudders the sum of $65,090.00 had been filed. Exceptions to the commissioners' report were overruled. Subsequently, the trial court, in a written opinion, specifically found that the taking of the Rudders' property was for public use, that the property was located in a blighted area, and that an adequate environmental impact study of the area had been made. By final order, the court overruled the motion to dismiss and confirmed the commissioners' report. On appeal, the question is whether the court erred in

overruling the motion to dismiss.

The finding made by the Authority that the project area was blighted or deteriorated was presumptively correct but subject to review by the trial court; nevertheless, the burden was upon the landowners to show by clear and convincing evidence that the finding was arbitrary and unwarranted. Runnels v. Housing Authority, 207 Va. 407, 411, 149 S.E. 2d 882, 885 (1966). See Adair v. Nashville Housing Authority, 388 F. Supp. 481, 489-490 (D. Tenn. 1974), aff'd, 514 F. 2d 38 (6th Cir.), cert. denied, 423 U.S. 928 (1975). Moreover, in passing on the sufficiency of the evidence to support the trial court's decision we view it in the light most favorable to the trial court's finding that the area was blighted.

The Rudders called as witnesses various persons who had participated in the survey, examination, and evaluation of the project area during the planning stages of the redevelopment project. These were engineers and consultants who had made

reports, based upon detailed inspection of the area and of the exteriors and interiors of the structures therein, that the project area was blighted or deteriorated within the meaning of Code § 36-49 and was eligible for redevelopment. It appears to be uncontradicted that the project area, excluding the Clinch River, aggregated approximately 80 acres. It further appears from a letter signed by Kenneth Poore, an engineer employed by one of the consulting firms that prepared studies and plans for the project, that the project area contained 109 principal buildings, of which 62, located on 15.1 acres, were classified as structurally substandard requiring or warranting clearance, and 42 others, located on 42 acres, warranted clearance to remove blighting factors (40 subject to periodic flooding, 1 obsolete building type, and 1 improperly located on the land). The remaining land, with slopes exceeding 50%, was inaccesible during periods of flooding.

The only witness who testified that the pro-

ject area was not blighted or deteriorated was a real estate broker, Andrew J. Hargroves. His familiarity with the area was limited. He conceded that he had been inside not more than twelve to fifteen of the buildings in the area, that some buildings already had been demolished when he made his inspection, and that he had spent only five minutes, prior to testifying, viewing photographs of the 109 buildings in the project area.

The Rudders rely heavily upon Housing Authority v. Denton, 198 Va. 171, 93 S.E. 2d 288 (1956), where we affirmed the ruling of the trial court that the housing authority had improperly classified a proposed redevelopment area as blighted. We held that the evidence clearly showed that the buildings in the area as a whole were not dilapidated. Denton, supra, 198 Va. at 179, 93 S.E. 2d at 294.

The housing authority in Denton had introduced evidence to show that 63.9% of the total redevelopment area was occupied by dwellings, and that 61% of these dwellings were dilapidated.

We stated, however, that this evidence, even if credible, did not necessarily establish the validity of the authority's actions as it would show that only 39% of the area as a whole was blighted. We agreed that the evidence fully supported the finding of the trial court that the majority of the residences were not blighted but were "'sound, safe, and well kept,'" and that the decision of the authority was "'. . . contra to the overwhelming weight of the evidence in the case.'" Id. at 180, 93 S.E. 2d at 295. See Annot., 45 A.L.R. 3d 1096, 1124-1125 (1972).

Contrary to the contentions of the Rudders, however, we did not establish a rigid mathematical formula to be used in evaluating the determination made by a housing authority that an area was eligible for redevelopment. Thus, in Runnels, supra, we based our decision not upon an inflexible standard, but upon the sufficiency of the evidence to support the trial court's finding that the housing authority's determination of blight was not arbitrary or unwarranted. See Annot.,

45 A.L.R. 3d 1096, 1127 (1972); Spies, Property, 1967 Survey of Virginia Law, 53 Va. L. Rev. 1642-1645 (1967).

In the present case, there was evidence that a majority of all the buildings, residential and non-residential, within the project area were dilapidated. In addition, there was evidence that most of the remaining buildings, the streets, and a large section of the undeveloped areas were adversely affected by periodic flooding and other blighting factors. This evidence supports the determination by the Authority and the finding of the trial court that the project area was blighted or deteriorated within the meaning of Code § 36-49. We cannot say, therefore, that the landowners carried their burden of proving by clear and convincing evidence that the Authority's finding of blight was arbitrary and unwarranted, or that the trial court's similar finding was contrary to the evidence or without evidence to support it. Accordingly, we hold that there was no reversible error in the court's ruling on this issue.

The Rudders next argue that the Authority sought to condemn their property ultimately for private use and benefit in violation of the Virginia (Article I section 11) and Federal (Amendments V and XIV) Constitutions. We do not agree.

Unquestionably, most of the land in the project area after clearance of buildings, rechannelization of the river, and construction of Alternate Route 58-A and access streets and roads, will be resold to private interests. Charles McConnell, Assistant Director of the Authority, conceded that probably 75% or more of the area would ultimately be controlled by private owners. Tyler Cornett, Executive Director of the Authority, testified that, in addition to the public purpose served by the rechannelization of the river and construction of the new highway, there would remain in the project area "open spaces for sort of a rustic outdoor development, picnic tables and that type of thing". But the primary public purpose contemplated by the Authority was the elimination of a blighted or deteriorated area. The disposition of the land,

although designed to prevent a recurrence of the blighted conditions, is incidental and subordinate to this primary purpose. Hunter v. Redevelopment Authority, 195 Va. 326, 335-337, 78 S.E. 2d 893, 899-900 (1953). See Mumpower v. Housing Authority, 176 Va. 426, 11 S.E. 2d 732 (1940). In this respect, the present case differs significantly from Phillips v. Foster, 215 Va. 543, 211 S.E. 2d 93 (1975), upon which the Rudders rely. In that case, we held that the statute (Code § 21-428) authorizing condemnation by a private individual of a drainage easement was unconstitutionally applied when the condemnor sought to acquire the easement for the purpose of developing property for private gain. Moreover, we were not there concerned with the power of eminent domain vested in housing authorities. See Inlet Authority v. Bastian, 206 Va. 906, 911, 147 S.E. 2d 131, 135 (1966). Thus, the Rudders' reliance upon Phillips is misplaced.

There is no merit in the Rudders' contention that the Authority violated Article XI section 1

of the Virginia Constitution[2] by failing to prepare a full and adequate environmental impact statement. No such statement is required by that constitutional provision, by any Virginia statute, or by the case cited by the Rudders, Rappahannock League v. VEPCO, 216 Va. 774, 222 S.E. 2d 802 (1976). Moreover, a lengthy environmental impact statement was filed by the Department of Housing and Urban Development. While the Rudders introduced evidence in an effort to show that various environmental factors had not been adequately studied and evaluated, the trial court found that

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[2]Article XI Section 1 provides:

"To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."

an adequate study had been made, and there was evidence to support this finding.

For the reasons assigned, the judgment of the trial court will be affirmed.

Affirmed.

VIRGINIA:

IN THE CIRCUIT COURT OF WISE COUNTY

WISE COUNTY REDEVELOPMENT
AND HOUSING AUTHORITY

VS: PETITION FOR CONDEMNATION

SKAGGS RUDDER
AND
WILMA L. RUDDER, his wife
Route 1
Bluff City, Tennessee

PARCEL NO. 30 and 31

BLOCK NO. 2

Fee Simple Title to all those certain lots, pieces or parcels of land situated in the Riverside Addition to the Town of St. Paul, Wise County, Virginia, and being lots numbered six (6), seven (7), eight (8), nine (9) and ten (10) in Block four (4) and lots six (6) seven (7) eight (8) nine (9) and ten (10) in Block Six (6) as shown on a map of the Riverside Addition to the Town of St. Paul.

TO THE HONORABLE M. M. LONG, JR., JUDGE OF SAID COURT:

Your Petitioner, Wise County Redevelopment and Housing Authority, respectfully represents unto Your Honor the following case:

I.

It is a duly constituted and acting political subdivision of the Commonwealth of Virginia created pursuant to the provisions of Title 36 of the Code of Virginia and by action of the Board of Supervisors of Wise County and by supporting action of the Town Council of St. Paul, Virginia, duly taken pursuant to statute. The present chairman of the Petitioner is W. C. Lambert.

II.

Among the powers granted to the Petitioner by law is the power of eminent domain, the Petitioner being granted the right by Section 36-27 of the Code of Virginia as amended to acquire any real property that may be necessary for the purposes of the Petitioner under said chapter, including, but not limited to, the clearing and rehabilitation of slum or blighted areas and the planning and completion of redevelopment projects and programs.

III.

Pursuant to the authority granted by Title 36 of the 1950 Code of Virginia, as amended, the

Petitioner made application to the United States of America through the Department of Housing & Urban Development for financial assistance in the development and implementation of a neighborhood redevelopment program in the corporate limits of St. Paul, the Town of St. Paul being both in Wise County and Russell County, which said area is designated "St. Paul Neighborhood Redevelopment Project" (VA-A-13). The application was approved and financial assistance provided. By proper Resolutions, the Petitioner determined that the area included within the boundary is a blighted area as defined by law and that conditions existing at various points therein are detrimental to the safety, health, morals and welfare of the community and that said area should be redeveloped and rehabilitated.

IV.

The Board of Supervisors of Wise County and the Town of St. Paul, Virginia approved the program as recommended by the Petitioner and determined that said program should be carried out.

V.

The Redevelopment Program contemplates and provides for the acquisition by the Petitioner of certain property within the Program area which, by reason of substandard conditions, or need for public use or relocation of streets or other lawful uses contemplated by said Program, are necessary to be acquired in order to carry out and effectuate the purpose and intent of the entire redevelopment program.

VI.

The rights and interests of the defendants herein named in the properties herein sought to be taken are wanted and needed by the Petitioner for the purpose of the redevelopment program for the rechannelization of the Clinch River, construction of Route 58-A, and reuse of said property and other properties within the boundaries of the program area, according to the purpose and intent of the Program, and to consummate and carry into completion the entire St. Paul Neighborhood Redevelopment Project.

VII.

Because of the inability to agree upon a price or because the necessary consent to the sale could not be obtained and/or because one or more of such owners is unable to convey legal title, or is unknown, or cannot with reasonable diligence be found within this State, or his or her address is unknown, the Petitioner has, by proper resolutions, declared that the acquisition of the properties therein described and herein sought to be condemned, was necessary and essential for the use and purpose of the Petitioner under said program, and authorize and directed its proper officials, agents and attorneys, in accordance with the statutes for such cases made and provided, to proceed with the condemnation proceedings in the proper Court and to acquire for the Petitioner the fee simple title in and to the lands and interest described herein.

VIII.

The public use for which the properties are to be taken is the redevelopment of said properties within the bounds of said program area according

to the program.

IX.

The work or improvement to be made within the boundary of the program area is the elimination, where they exist within the area, of slum conditions due to dilapidation and obsolescence of buildings, the faulty arrangement of their design, excessive land coverage of buildings, deleterious land use, obsolete layout, narrow streets and excessive grades, to obtain conformity with the subdivision and other ordinances, and to provide adequate light, air, ventilation and public utility service by a redevelopment and rehabilitation of said area according to the program as it evolves, thereby providing proper and orderly development and rehabilitation of said area for private, commerical, housing, industrial, recreational, and residential use through proper street rearrangement and relocation where needed to alleviate flooding conditions by rechannelization of the Clinch River, reconstruction of Route 58-A, redevelopment of the outlying areas, and to provide

other public facilities. A plat, drawing or plan thereof is not necessary to be filed herein, as the whole of the subject properties are to be taken, and such taking will not result in damage to other properties so far as is now known to the Petitioner.

X.

The estates, interests and rights to be taken in these proceedings are titles in fee simple.

XI.

The descriptions of the properties to be taken are as follows:

> PARCEL NO. 30 AND 31, BLOCK NO. 2
> Fee Simple Title to all those certain lots, pieces or parcels of land situated in the Riverside Addition to the Town of St. Paul, Wise County, Virginia, and being lots numbered six (6), seven (7), eight (8), nine (9) and ten (10) in Block four (4) and lots six (6) seven (7) eight (8) nine (9) and ten (10) in Block Six (6) as shown on a map of the Riverside Addition to the Town of St. Paul

Being those same certain lots, pieces or parcels of land heretofore conveyed to Skaggs Rudder by deed dated the 28th day of December, 1948, from Wilma L. Rudder, which said deed was recorded in

the Clerk's Office of Wise County, Virginia, in Deed Book 355, page 79, etc., reference to which said deed is hereby made for more particular description hereof.

A plat of the St. Paul Neighborhood Redevelopment Project, dated February 1974, showing the properties herein sought to be condemned by the parcel numbers shown herein is attached hereto and marked Exhibit A and prayed to be read a part of this Petition.

XII.

As to each separate piece of property to be taken, the names and addresses of the owners thereof, as far as known by the Petitioner, are set forth in the caption of this Petition and they are hereby incorporated by reference into this paragraph in this Petition.

XIII.

Ineffectual efforts have been made to acquire the property by purchase except where such consent could not be obtained because of the incapacity of one or more of such owners or because one or more

of such owners was or is unable to convey legal title to such property or is unknown or cannot with reasonable diligence be found within this State.

XIV.

The provisions of Virginia Code Section 25-233 are not applicable to this proceeding.

WHEREFORE, your Petitioner prays that it be allowed to file this Petition and that the above-named owners and all other interested parties may be made parties defendant to this Petition; and that all proper processes may issue and that all proceedings may be conducted pursuant to Title 25 of the 1950 Code of Virginia, as amended; and that right of entry upon the property may be had pursuant to Title 25 of the 1950 Code of Virginia, Section 46.8, as amended; and that judgment may be awarded to the Petitioner that said properties herein sought to be condemned shall be so condemned, and the title thereto vested in your Petitioner; and that just compensation for the properties taken, and the damages, if any, as a result of the taking

and use by your Petitioner, beyond the peculiar benefits, if any, by reason of such taking and use by your Petitioner, be ascertained and awarded, and then distributed to the proper persons entitled thereto, and for all such further relief as may be lawful and proper.

WISE COUNTY REDEVELOPMENT
& HOUSING AUTHORITY

BY: /s/ W. C. Lambert
CHAIRMAN

STURGILL AND STUMP
ATTORNEYS AT LAW
464 PARK AVENUE
NORTON, VIRGINIA 24273

BY: /s/ J. Robert Stump
COUNSEL FOR PETITIONER

STATE OF VIRGINIA,
COUNTY OF WISE, To-Wit:

This day, W. C. Lambert, Chairman of the Wise County Redevelopment & Housing Authority, personally appeared before me, Tyler Cornett, a Notary Public in and for the County aforesaid, and in the State of Virginia, in my said County aforesaid, and being duly sworn, made oath that he is the

Chairman of the Wise County Redevelopment & Housing Authority, whose name is signed to the foregoing Petition by him as its Chairman, and that the matters and things therein stated are true.

Given under my hand and seal this 14 day of April, 1976.

My commission expires July 14, 1978.

/s/ Tyler Cornett
NOTARY PUBLIC

VIRGINIA:

IN THE CIRCUIT COURT OF WISE COUNTY

WISE COUNTY REDEVELOPMENT AND
HOUSING AUTHORITY, Petitioner

v.

SKAGGS RUDDER
AND
WILMA L. RUDDER, his wife
Route 1
Bluff City, Tennessee

PARCEL NO. 30 and 31

BLOCK NO. 2

Fee Simple Title to all those certain lots, pieces or parcels of land situated in the Riverside Addition to the Town of St. Paul, Wise County, Virginia, and being lots number six (6), seven (7), eight (8), nine (9) and ten (10) in Block four (4) and lots six (6) seven (7), eight (8), nine (9) and ten (10) in Block Six (6) as shown on a map of the Riverside Addition to the Town of St. Paul Defendants

ANSWER

Comes now your Defendants, Skaggs Rudder and Wilma L. Rudder, his wife, in the above styled case and for answer to the Notice of the Petitioner to Appoint Commissioners and to Require Grounds of Defense in the above styled case would answer

and state:

I.

It denies that the Wise County Redevelopment and Housing Authority is a duly constituted and acting political subdivision of the Commonwealth of Virginia or that it is duly and properly created pursuant to the provisions of Title 36 of the Code of Virginia and calls for strict proof thereof prior to any hearing for valuation. In addition, it denies that the Wise County Redevelopment and Housing Authority has the constitutional authority to condemn this land even if it is properly created pursuant to the Code of Virginia.

II.

It denies that it is either necessary or proper for the Wise County Redevelopment and Housing Authority to condemn this land and it further denies that the area involved is a slum or blighted area or that it is necessary to be condemned in order to complete redevelopment projects and programs which are valid and proper redevelopment projects and programs and calls for strict proof

thereof.

III.

It admits that the Petitioner made application to the United States of America for Federal funding through the Department of Housing and Urban Development but it denies that the application was properly approved financial assistance provided. It further denies that the Petitioner or any other agency properly and correctly determined that the area was blighted as defined by law and that the conditions existing at various points therein were detrimental to the safety, health, morals and welfare of the community and that the area should be redeveloped and rehabilitated. The Defendant herein calls for strict proof of all of these points. In addition, it would state that neither the Wise County Redevelopment and Housing Authority nor any other agency has the authority to condemn this land without a fully adequate and proper environmental impact study first being done and approved.

Your Defendants would state that the Wise

County Redevelopment and Housing Authority and the Federal agencies involved therewith have not done such a proper and complete environmental impact study or that it is an adequate environmental impact study and therefore they do not have the authority under Federal law to carry out the project. While they might have the authority under the State law, they would not have the funds to carry out the projects; and not having the funds to carry through with the project, this project is neither necessary or proper under the laws and Constitution of both the Commonwealth of Virginia and the United States of America.

IV.

While it admits that the Board of Supervisors of Wise County and the Town Council of St. Paul approved the program as recommended by the Petitioner and determined that said program should be carried out, they would state that this is irrelevant and immaterial to the other issues raised herein.

V.

The Defendant denies that any of the property

involved herein is substandard or that there is any need for the public use or relocation of streets or other lawful uses contemplated by the program, or that it is necessary to acquire this land in order to carry out and effectuate the purpose and intent of the entire redevelopment program. In addition, your Defendants would aver that the purpose of the condemnation of this land is to later resell the land to private individuals and the entire purpose of this condemnation is in violation of the Fourth and Fourteenth Amendments to the United States Constitution and the Constitution of the Commonwealth of Virginia.

VI.

They deny that the Petitioner needs the Defendant's land in this case for the rechannelization of the Clinch River, the construction of Route 58-A, and they deny that the reuse of said property and other properties within the boundaries of the program area, according to the alleged purpose and intent of the program, are either necessary, proper or valid under the Constitution of

Virginia and of the United States.

VII.

In answer to Paragraph VII. of the Petition, they would state that even if the Wise County Redevelopment and Housing Authority does have the authority to condemn the said land, which the Defendants deny specifically, the amount offered for this land is rediculously insufficient and does not take into consideration any of the damages that will be suffered by the Defendants herein. Allowing this land to be taken for the amount originally offered would be in effect depriving the Defendants of their property without equal protection or due process of law.

VIII.

The Defendants would deny the allegations of Paragraph VIII. of the Petition and call for strict proof thereof.

IX.

The Defendants would allege that there are no slum conditions in the property involved; that there is any faulty arrangement of their design;

that there is excessive land coverage of buildings; that there is deleterious land use; that there is an obsolete layout; and in general deny all of the allegations of Paragraph IX. of the Petition and call for strict proof thereof.

X.

Your Defendants deny that these proceedings are sufficient to take fee simple interest in this land and call for strict proof thereof.

XI.

The Defendants admit the allegations of Paragraph XI. but they do not admit that there is fee simple Title involved herein and they deny that the Petitioner has the right or authority to take any of this land.

XII.

Finally, your Defendants would respectfully submit that Judge Long has earlier expressed a deep personal interest in the success of the St. Paul project and since they are not only contesting the valuation offered but the entire constitutionality of the taking and the project itself, would re-

spectfully request that another Judge be assigned to hear the case in this particular matter.

WHEREFORE, you Defendants respectfully deny that the Wise County Redevelopment and Housing Authority has any authority whatsoever under the Constitution of this Commonwealth and of the United States to condemn this land and under Federal and State statutes and under such circumstances it is respectfully represented that there is no need to appoint any Commissioners to determine the value of this land. Your Defendants would further request that the Notice of the Petitioner to Appoint Commissioners and to Require Grounds of Defense in the above styled matter be dismissed forthwith and that the Petitioner be enjoined from taking any further action whatsoever on this case until such time until its right to condemn this land has been fully adjudicated by the courts.

Respectfully submitted,

SKAGGS RUDDER
and
WILMA L. RUDDER

By Counsel

By: /s/ S. Strother Smith, III
Smith, Robinson & Vinyard
Attorneys At Law, Inc.
117 West Main Street
Abingdon, Virginia 24210

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was mailed to J. Robert Stump, Esquire, Sturgill and Stump, Attorneys-at-Law, 464 Park Avenue, Norton, Virginia, 24273, this 11th day of May, 1976.

/s/ S. Strother Smith, III
Smith, Robinson & Vinyard
Attorneys at Law, Inc.
117 West Main Street
Abingdon, Virginia 24210

IN THE SUPREME COURT OF VIRGINIA

SKAGGS and WILMA RUDDER

Plaintiff

vs 700582

WISE COUNTY REDEVELOPMENT
AND HOUSING AUTHORITY

Defendants

NOTICE OF APPEAL

Come now the appellants in the above styled case and hereby give notice under provision 28USC Section 1257 that they are appealing the adverse decision of the Supreme Court of Virginia entered the 22nd day of November, 1978 and in so doing state the following:

1) the parties taking appeal are Skaggs and Wilma Rudder

2) the judgement appealed from that judgement and opinion entered on the 22 day of November, 1978

3) the statute under which this appeal is taken is 28USC Section 1257 (2 and/or 3)

The portions of record certified by the Clerk of the Supreme Court of Virginia include all of the record set forth in the joint appendix to the appeal

to the Supreme Court of Virginia.

The questions presented to appeal include the following:

1) whether the condemnation of the appealed property under the State statute authorizing condemnation to allow the redevelopment of urban blight is an unconstitutional taking of property under the U. S. Constitution where the project area exists in a rural setting and the majority of the project area is undeveloped mountainside and river bed, and whether such condemnation constitutes and infrinement of appellants rights to hold and enjoy real property safe from arbitrary seizure by governmental entities as guaranteed by the 5th and 14th Amendments to the U. S. Constitution?

2) whether the State statute allowing the exercise of power of eminent domain in this case violated the equal protection and due process clause of the Constitution of the U. S. in that the taking for this project was for private purposes?

3) whether the State statute allowing the exercise of power of eminent domain in that Section 36-49 (5) of the 1950 Code of Virginia as amended is unconstitutional as applied and/or on its face?

4) did the environmental impact statement prepared by the appealee adequately meet the letter and spirit of Federal laws aimed at protecting the environment from reckless progress?

5) does this project by a state agency and

the taking of this property by such agency for the purpose "in part" of rechannelizing of the Clinch River violate the pre-emptive rights of the Federal government to control navigable waters under Article I Section 8 of the U. S. Constitution and under Title 33 of the U. S. Code including but not limited to 33 U. P. S. C. 403, 411, 419, 466, 467 and 497.

Respectfully submitted,

SKAGGS and WILMA RUDDER

By Counsel

/s/ S. Strother Smith, III
S. Strother Smith, III
Smith, Robinson & Vinyard
117 West Main Street
Abingdon, Virginia 24210

Certificate of Service

In accordance with Rule 33 of the Rules of the U. S. Supreme Court, I hereby certify that a copy of the forgoing was served on J. Robert Stump, Esq. attorney for Wise County Redevelopment and Housing Authority by mailing same by first class postage to said J. Robert Stump at 464 Park Avenue, Norton, Virginia 24273.

/s/ S. Strother Smith, III
S. Strother Smith, III

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SMITH ROBINSON AND VINYARD S STROTHER SMITH
117 WEST MAIN ST
ABINGDON VA 24210

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

7036287186 TDMT ABINGDON VA 253 02-16 0309P EST
PMS CLERK UNITED STATES SUPREME COURT, RPT DLY BY MGM, DLR
SUPREME COURT BLDG
WASHINGTON DC

RE: SKAGGS AND WILMA RUDDER VS. WISE COUNTY REDEVELOPMENT AND HOUSING AUTHORITY VIRGINIA SUPREME COURT NUMBER 770582

COME NOW THE APPELLANTS IN THE ABOVE STYLED CASE WHO HAD FINAL JUDGEMENT RENDERED AGAINST THEM BY A DECISION OF THE SUPREME COURT OF VIRGINIA ON THE 22ND DAY OF NOVEMBER 1978 AND ON THIS 16TH DAY OF FEBRUARY 1979 UNDER THE PROVISIONS 28 U.S.C. SECTION 2101 (C) MOVE THE HONORABLE CHIEF JUSTICE OF THIS COURT FOR AN EXTENSION OF TIME TO APPLY FOR A WRIT OF CERTIORARI AND / OR TO DOCKET AN APPEAL ON THE GROUNDS THAT BECAUSE OF FINANCIAL CONSIDERATIONS AND ATTEMPTS TO WORK OUT AN SETTLEMENT WITH THE APPELLEE WHICH FINALLY PROVED TO BE UNSUCCESSFUL AND BECAUSE OF APPELANTS' COUNSEL BEING OUT OF TOWN IN A JURY TRAIL APPELANTS WERE UNABLE TO MAKE A FINAL DECISION TO APPEAL SAID ADVERSE JUDGEMENT AND TO NOTIFY COUNSEL OF THAT DECISION UNTIL THURSDAY FEBRUARY 15TH 1979 WHICH 85 DAYS AFTER THE ENTRY OF FINAL JUDGEMENT IN THE VIRGINIA SUPREME COURT OR WITHIN 5 DAYS OF THE DATE SUCH PETITION FOR CERTIORARI OR PERFECTION OF AN APPEAL WOULD

NORMALLY BE DUE, AND ON THE FURTHER GROUNDS THAT IT IS PHYSCIALLY IMPOSSIBLE FOR APPELANTS' COUNSEL TO PREPARE AND FILE SUCH PAPERS WITHIN THE NORMALLY PRESCRIBED TIME.

APPELANTS' COUNSEL, BE A MEMBER OF THE BAR OF THIS COURT HEREBY CERTIFIES THAT IN HIS PROFESSIONAL OPINION APPELANT'S HAVE VALID GROUNDS FOR AN APPEAL OR PETITION FOR CERTIORARI.

APPLICATION FOLLOWS.
CC J ROBERT STUMP ESQ. STURGILL AND STUMP
464 PARK AVE NORTON VA 24273
S. STROTHER SMITH III ATTORNEY FOR SKAGGS AND WILMA RUDDER

(117 WEST MAIN ST ABINGDON VA 24210)

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S STROTHER SMITH III, ATTORNEY
117 WEST MAIN ST
ABINGDON VA 24210

REGARDING YOUR TELEGRAM DATED 16 FEB 79 TO CLERK
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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 28, 1979

S. Strother Smith, III, Esquire
Smith, Robinson & Vinyard
117 West Main Street
Abingdon, Virginia 24210

Re: Skaggs Rudder, et al. v. Wise County
Redevelopment and Housing Authority
A-760

Dear Mr. Smith:

Your application for an extension of time in which to file a petition for a writ of certiorari and/or docketing an appeal in the above-entitled case has been presented to Mr. Chief Justice Burger who, on February 27, 1979, signed an order extending your time to and including April 1, 1979.

A copy of the Chief Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

/s/ Patricia A. Dean

Patricia A. Dean
Assistant Clerk

th
Enc.

cc: J. Robert Stump, Esquire
Sturgill & Stump
464 Park Avenue
Norton, Virginia 24273

Supreme Court of the United States

No. A-760

SKAGGS RUDDER, ET AL.,

Applicants

v.

WISE COUNTY REDEVELOPMENT AND HOUSING AUTHORITY

O R D E R

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari and/or for docketing an appeal in the above-entitled cause be, and the same hereby is, extended to and including April 1, 1979.

/s/ Warren E. Burger

Chief Justice of the United States

Dated this 27th
day of February, 1979

§ 36-48.1. Findings and declarations reaffirmed; further findings and declarations. - The findings and declarations made in § 36-48 are hereby reaffirmed and it is hereby further found and declared that: Certain blighted, deteriorated or deteriorating areas, or portions thereof, are, through the means hereinafter provided, susceptible of conservation through appropriate public action and the elimination or prevention of the spread or increase of blight or deterioration in such areas is necessary for the public welfare and is a public purpose for which public money may be spent and private property acquired by purchase or by the power of eminent domain, and is a governmental function of grave concern to the Commonwealth. (1964, c. 378.)

§ 36-49. Undertakings constituting redevelopment projects. - Any authority now or hereafter established, in addition to other powers granted by this or any law, is specifically empowered to carry out any work or undertaking (hereafter called a "redevelopment project"):

(1) To acquire blighted or deteriorated areas, which are hereby defined as areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community;

(2) To acquire other real property for the purpose of removing, preventing, or reducing blight, blighting factors or the cause of blight;

(3) To acquire real property where the condition of the title, the diverse ownership of the real property to be assembled, the street or lot layouts, or other conditions prevent a proper development of the property and where the acquisition of the area by the authority is necessary to carry out a redevelopment plan;

(4) To permit the preservation, repair, or restoration of buildings of historic interest; and to clear any areas acquired and install, construct, or reconstruct streets, utilities, and site improvements essential to the preparation of sites for uses in accordance with the redevelopment plan;

(4a) To provide for the conservation of portions of the project area and the rehabilitation to project standards as stated in the redevelopment plan of buildings within the project area, where such rehabilitation is deemed by the authority to be feasible and consistent with project objectives;

(5) To make land so acquired available to private enterprise or public agencies (including sale, leasing, or retention by the authority itself) in accordance with the redevelopment plan; or [Emphasis supplied]

(6) To accomplish any combination of the foregoing to carry out a redevelopment plan. (1946, p. 278; Michie Suppl. 1946, §3145(8b); 1962, c. 336; 1972, cc. 466, 782.)

Supreme Court, U. S.
FILED
APR 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 78-1508

SKAGGS RUDDER, ET UX

APPELLANTS

V.

WISE COUNTY REDEVELOPMENT AND HOUSING AUTHORITY

APPELLEE

ON APPEAL FROM THE VIRGINIA SUPREME COURT

BRIEF IN OPPOSITION

J. ROBERT STUMP
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IN THE

Supreme Court of the United States

NO. 78-1508

SKAGGS RUDDER, ET UX

APPELLANTS

V.

WISE COUNTY REDEVELOPMENT AND HOUSING AUTHORITY

APPELLEE

ON APPEAL FROM THE VIRGINIA SUPREME COURT

BRIEF IN OPPOSITION

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

HISTORY OF PROCEEDINGS

The Appellants' Statement of the History of the Proceedings is substantially correct.

STATEMENT OF FACTS

The Wise County Redevelopment and Housing Authority, (the Authority), a political subdivision created pursuant to the Virginia Housing Authorities Law, determined that the subject area of the Town of St. Paul, Virginia was blighted with the assistance inter alia of the Town of St. Paul, Lenowisco Planning District Commission, Weeks & Associates, structural engineers, Wingate & Associates, real estate appraisers, Harland Bartholomew & Associates, planning consultants, Thompson & Litton Engineers, the Tennessee Valley Authority and the Department of Transportation of the Commonwealth of Virginia.

A redevelopment project in the

determined slum area of St. Paul, Virginia was initiated with the full cooperation of: the Town of St. Paul and its citizens; TVA to rechannel the Clinch River to prevent flooding; Virginia Department of Highways to construct a four-lane highway; and the Department of HUD to provide federal funding for the removal and prevention of blight and deterioration under a Neighborhood Development Program. It is a multi-million dollar redevelopment plan which is unparalleled in the United States for cooperation with so many diversified Federal and State agencies, and political entities.

Prepared studies, examinations, surveys and evaluations showed that the project area contained approximately 80 acres, excluding the Clinch River, 109 principal buildings, of which 62,

located on 15.1 acres, were classified as structurally substandard requiring or warranting clearance, and 42 others, located on 42 acres, warranted clearance to remove blighting factors (40 subject to periodic flooding, 1 obsolete building type, and 1 improperly located on the land); and the remaining land, with slopes exceeding 50%, was inaccessible during periods of flooding. A majority of all the buildings, residential and non-residential, within the project area were dilapidated. Most of the remaining buildings, streets and a large section of the undeveloped areas were adversely affected by periodic flooding and other blighting factors. See Virginia Supreme Court Opinion Appendix "C" pages 6, 7 and 10, Appellants' Jurisdictional Statement.

The purpose of this project is found in the following exhibits:

(1) Ken Poore Exhibit #1, Comprehensive Plan, Housing Section, pps. 16-22, including Plate 2 (required steps to eliminate blight); (2) Ken Poore Exhibit #4, Feasibility Study, (Va. Sup. Ct. Supp. App. pps. 121-123) (reasons for selection of the project area); (3) Ken Poore Exhibit #5, ND 401: (Development Goals and Objectives) (Va. Sup. Ct. Supp. App. pps. 155-8); paragraph D. (Urban Renewal Techniques to be Used to Achieve Plan Objectives) (Va. Sup. Ct. Supp. App. pps. 164-5), paragraph F. (Other Provisions Necessary to Meet Requirements of Applicable State or Local Law) (Va. Sup. Ct. Supp. App. pps. 165-6).

The project is a full cooperation between the Tennessee Valley Authority, which will re-channel the Clinch River and avoid flooding the St. Paul project area; the Department of Housing and

Urban Development, which will provide for removal and prevention of blight and deterioration and housing sites for the displaced, poor, slum and deteriorated dwellers; and the Virginia State Department of Highways, which will provide a four-lane public highway through the project area, which will benefit both the commercial, industrial and private citizens of the St. Paul area. There will be parks located in the project area, and the primary purpose of the project will be effectuated, which is to rehabilitate a slum or deteriorated area and provide for residential uses, rustic outdoor recreation, commercial businesses, industry, roadways, alleviate flooding, provide a more adequate water supply, alleviate raw sewage being dumped into the Clinch River, and provide more adequate transportation for all the public in this

immediate area. (The project when originally started, was estimated to cost approximately $9 million, and this figure has now escalated to more than $17 million. Acquisition in the project area is now complete except for the Rudders' property.)

However, the Virginia Supreme Court held that "most of the land in the project area after clearance of buildings, rechannelization of the river, and construction of Alternate 58-A and access streets and roads, will be resold to private interests"; that "75% or more of the area would ultimately be controlled by private owners"; and "in addition to the public purpose served by the rechannelization of the river and construction of the new highway, there would remain in the project area 'open spaces for sort of a rustic outdoor development, picnic tables and that

type of thing'." See Virginia Supreme Court Opinion,Appendix "C" page 11, Appellants' Jurisdictional Statement.

An environmental impact statement (E.I.S.) was not prepared by the Authority, but an E.I.S., which is an exhibit filed herein consisting of 235 pages, was prepared by the Department of HUD to assess the environmental impact of Federal funding of the project, which was found to be adequate by the two lower courts, and is recorded in the Federal Register.

SUMMARY OF THE ARGUMENT

I.

The Trial Court and Virginia Supreme Court did not err in holding that the Authority had the power of eminent domain pursuant to the Virginia Housing Authorities Law to acquire property for the public purpose of erradicating a blighted area and avoiding the recur-

rence of same, when as incidental thereto said property would ultimately be reconveyed for private use. Therefore, this was not a violation of the State and Federal Constitutions; and to hold otherwise would create chaos and confusion in the Law.

II.

The Trial Court and Virginia Supreme Court did not err in holding that it was legally unnecessary for the Authority to file an environmental impact statement prior to the institution of condemnation proceedings; and that the E.I.S. filed by the Department of H.U.D. was adequate as proven by the facts of the case.

III.

The Trial Court and Virginia Supreme Court did not err in holding that blight in the project area was proven by the facts and law of the case.

ARGUMENT

I.

CONSTITUTIONAL ISSUE-- PRIVATE USE OF PROPERTY AFTER ACQUISITION

Appellants' primary argument is that the Authority sought to condemn their property ultimately for private use in violation of the Virginia (Article I, Section 11) and Federal (Amendments 5 and 14) Constitutions.

Rudders rely on this State Constitutional issue to obtain an automatic right of appeal to this court. We submit that this issue is settled by a great majority of the state cases in the United States and by this Court. Therefore, this issue should be considered as a petition for Writ of Certiorari and the Rudders should be denied an appeal or hearing for the reasons cited herein. See 28 USCS §1257(3). It will only waste this

Court's valuable time to hear this case.

There is evidence in this case of public use of the after acquired property, for example: four-lane public highway, public park, recreation areas, sewage treatment plant, possibly public housing and "possibly for a library or clinic or something." (Va. Sup. Ct. Appendix pps. 137-8) . However, the Virginia Supreme Court based its decision on the fact that a majority of the after acquired property would be used or controlled by private individuals. Therefore, that court addressed head-on the constitutional issue, which is now presented to this Court.

"Unquestionably, most of the land in the project area after clearance of buildings, rechannelization of the river, and construction of Alternate Route 58-A, and access streets and roads,

will be resold to private interests. Charles McConnell, Assistant Director of the Authority, conceded that probably seventy-five percent or more of the area would ultimately be controlled by private owners. Tyler Cornett, Executive Director of the Authority, testified that, in addition to the public purpose served by the rechannelization of the river and construction of the new highway, there would remain in the project area 'open spaces for sort of a rustic outdoor development, picnic tables and that type of thing'." See Virginia Supreme Court opinion, Appendix "C", page 11, of Appellants' Jurisdictional Statement.

Pursuant to Title 36 of the Virginia Housing Authorities Law the following code sections have been held Constitutional by the Virginia Supreme Court in authorizing the taking of

private property for other than a public use: Virginia Code Sections 36-48; 36-48.1; 36-49.1; 36-53; and 36-51.1. Such powers of the Authority do not defeat the "public purpose" which occasions the taking of the property because making such property available to private enterprise is merely incidental to the same purpose of the authority and is reasonably designed to prevent recurrence of the conditions producing slum or blighted areas. Mumpower v. Housing Authority, 176 Va. 426, 11 S.E. 2d. 732; Hunter v. Norfolk Redevelopment and Housing Authority, (1953) 195 Va. 326, 78 S.E. 2d. 893; Bristol Redevelopment and Housing Authority v. Denton, (1956) 198 Va. 171, 93 S.E. 2d. 288; Runnels v. Staunton Redevelopment and Housing Authority (1966) 207 Va. 407, 149 S.E. 2d. 882; and Skaggs Rudder, etc. v. Wise County Redevelopment and

Housing Authority, ____ Va. _____, 249, S.E. 2d. 177 (1978).

The Rudders, in their Constitutional arguments, rely on the theory of "public use". They miss the point all together. They argue apples are oranges, which is not relevant. They do not cite or rely on any Redevelopment and Housing Authority cases in the United States or Virginia.

The Rudders argue generally (without touching the real issue of this case) that the use of public funds to acquire private property and then sell it to private individuals is unconstitutional. They cite as authority to this proposition the Virginia case of Rudee Inlet Authority v. Bastian, 206 Va. 906, 147 S.E. 2d. 131. However, in that case in 147 S.E. 2d. at page 135, the Virginia Supreme Court made the distinction as to Housing

Authority cases. In the case at bar the Virginia Supreme Court again said that the Rudee Inlet Authority case is not applicable because in that case "we were not there concerned with the power of eminent domain vested in housing authorities".

The Rudders also rely on the case of Phillips v. Foster, 215 Va. 543, 211 S.E. 2d. 93 (1975), where the Virginia Supreme Court held "a Statute (Code Section 21-428) authorizing condemnation by a private individual of a drainage easement was unconstitutionally applied when the condemnors sought to acquire the easement for the purpose of developing property for private gain." Again the Virginia Supreme Court in the case at bar held that "the Rudders reliance upon Phillips is misplaced". See Opinion of the Virginia Supreme Court in Appendix "C", page 12 of Appellants'

Jurisdictional Statement.

The controlling case in Virginia is Hunter v. Norfolk Redevelopment and Housing Authority, Supra, where the Housing Authority had filed a petition to condemn certain land, alleging that such property was needed to effectuate a slum clearance and redevelopment plan under Virginia Code Section 36-1 et seq. The condemnees had argued that the redevelopment provisions of the statutory law, Virginia Code 36-48 to 36-53 were an unconstitutional attempt to extend the police powers of the state. In this regard, it was argued that a Housing Authority is empowered to make redevelopment land available for use by a private enterprise, and that allowing private persons or agencies to take the land for redevelopment purposes did not amount to a public use. In rejecting this contention the Virginia Supreme Court stated

that:

> "The contention of the condemnees that the taking of their property is for private use misconceives the nature and extent of the public purpose which is the object of this legislation. The primary purpose of the taking is the irradication of 'blighted or deteriorated areas', 'including slum areas', the reconstruction and rehabilitation of the areas, and the adaptation of them to the uses which will prevent a recurrence of the blighted or slum conditions.
>
> In Mumpower v. Housing Authority, 176 Va. 426, 11 S.E. 2d. 732, notwithstanding a similar constitutional attack, we held that the irradication of slum areas and the adaptation of the property to a low-cost housing project, to be leased to tenants, was a public use and a valid exercise of the police power of the state. In that case we further held that the provisions of Section 8(d) of the 1938 Housing Act, now Code Section 36-9(d), empowering the Authority to sell ... transfer ... or dispose of any real ... property or any interest therein', did not defeat the 'public use' which occasioned the taking of the property. 176 Va. at page 456, 11 S.E. 2d. at page 744. That is because such sale or transfer is merely incidental or collateral to the primary

purpose of the act...."

Similarly, under the provisions of the 1946 Act authorizing "Redevelopment Projects", Code §36-48 ff., the primary purpose is the elimination of blighted or slum areas, and the provision in Code §36-53, making property available for redevelopment by private enterprise is merely incidental to such main purpose. The act contemplates that in the course of a large slum clearance operation there will be some sections which are not needed or suitable for long-range public use, and that after being purged of their unwholesome characteristics they will be returned to a restricted private use. Section 36-53 is designed to prevent a recurrence of the conditions which blighted the area by requiring that the land so sold or leased by an authority to private enterprise will be made subject to such restrictions and conditions as will carry out the purposes of the Act.

Similar legislation has been enacted by thirty-two states. (In 1940) Its constitutionality has been upheld against a similar attack by the highest courts of Alabama, Arkansas, Illinois, Maryland, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Tennessee. Only the courts of Florida and Georgia have held to the contrary. (In 1979 this is no

longer true. See Fla. and Ga. cases cited herein holding with the majority rule now).

The reasoning of the courts which have adopted the majority view is that the primary purpose of the legislation is the elimination and rehabilitation of the blighted and slum sections of the cities, that such purpose falls within the conception of public use, and that when the need for public ownership which occasioned the taking has terminated it is proper that the land be transferred to private ownership, subject to such restrictions as are necessary to effectuate the purposes of the act and prevent the recurrence of the unwholesome conditions. Such resale being it is said, merely incidental to the primary purpose of the taking."

The following is a list of the State cases (a majority in the United States) that hold that a housing authority or other similar agency has the authority to take blighted areas in eminent domain proceedings and reconvey the land to private interests. The public benefit or purpose is the destruction of the slums; the fact that

the land ends up in private hands is incidental to the public use or purpose:

Hunter v. Norfolk Redevelopment & Housing Authority, 195 Va. 326, 78 S.E. 2d 893 (1953)

Bailey v. Housing Authority of City of Bainbridge, 214 Ga. 790, 107 S.E. 2d 812 (1959)

Redevelopment Commission of Greensboro v. Security National Bank of Greensboro, 252 N.C. 595, 114 S.E. 2d 688 (1960)

Blankenship v. City of Decatur, 269 Ala. 670, 115 So. 2d 459 (1959)

Grubstein v. Urban Renewal Agency of City of Tampa, 115 So. 2d 745 (Fla. 1959)

Rowe v. Housing Authority of City of Little Rock, 220 Ark. 698, 249 S.W. 2d 551 (1952)

State v. Land Clearance for Redevelopment Authority, 364 Mo. 974, 270 S.W. 2d 44 (1954)

Nashville Housing Authority v. City of Nashville, 192 Tenn. 103, 237 S.W. 2d 946 (1951)

Miller v. City of Louisville, 321 S.W. 2d 237 (Ky. 1959)

Davis v. City of Lubbock, 160 Tex. 38, 326 S.W. 2d 699 (1959)

Foeller v. Housing Authority of

Portland, 198 Ore. 205, 256 P. 2d 752 (1953)

Rabinoff v. District Court, 145 Colo. 225, 360 P. 2d 114 (1961)

State v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 296 P. 2d 656 (1956)

Isaacs v. Oklahoma City, 437 P. 2d 229 (Okla. 1966), cert. denied, 389 U.S. 825 (1967)

Crommett v. City of Portland, 150 Me. 217, 107 A. 2d 841 (1959)

Herzinger v. Mayor & City Council of Baltimore, 203 Md. 49, 98 A. 2d 87 (1953)

Velishka v. City of Nashua, 99 N.H. 161, 106 A. 2d 571 (1954)

Wilson v. City of Long Branch, 27 N.J. 360, 142 A. 2d 837 (1958)

Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A. 2d 612 (1950)

Balsamo v. Providence Redevelopment Agency, 84 R.I. 323, 124 A. 2d 238 (1956)

Randolph v. Wilmington Housing Authority, 37 Del. Ch. 202, 139 A. 2d 476 (1958)

Chicago Housing Authority v. Berkson, 415 Ill. 159, 112 N.E. 2d 620 (1953)

Papadinis v. City of Somerville,

331 Mass. 627, 121 N.E. 2d 714 (1954)

Cannata v. City of New York, 11 N.Y. 2d 210, 183 N.E. 2d 395 (1962)

State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953)

In re City of Center Line, 387 Mich. 260, 196 N.W. 2d 144 (1972)

S.O. Realty Co. v. Sewerage Commission, 15 Wis. 2d 15, 112 N.W. 2d 177 (1961)

Pilley v. City of Des Moines, 247 N.W. 2d 187 (Iowa 1976)

Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 266 P. 2d 105 (1954)

Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P. 2d 575 (1972)

Fishman v. City of Stanford, 159 Conn. 116, 267 A. 2d 443 (1970)

Hawley v. South Bend, ____ Ind. ____, 383 N.E. 2d 333 (1978)

Housing and Redevelopment Authority v. Froney, 305 Minn. 450, 234 N.W. 2d 894 (1973)

Paulk v. Housing Authority of Tupelo, 195 So. 2d 488 (Miss. 1967)

Miller v. City of Tacoma, 61 Wash. 2d 374, 378 P. 2d 464 (1963); City of Seattle v. Loutsis Investment Co., Inc., 16 Wash. App. 158, 554 P. 2d 379 (1976)

See also 44 A.L.R. 2d 1414.

This Court has established the well settled majority view on this point in Berman v. Parker 348 U.S. 26, 99 L Ed. 27, 75 S. Ct. 98 (1954), which remains the law in 1979.

Berman v. Parker was an eminent domain proceeding in the City of Washington, D.C., to remove blight and slum areas, redevelop and eradicate future recurrence of such areas. The appellants contended that its commercial property "will be put into the project under the management of a private, not public use." ... and that "private property is being taken contrary to two mandates of the Fifth Amendment--(1) 'No person shall ... be deprived of ... property, without due process of law'; and (2) 'nor shall private

property be taken for public use, without just compensation'." This theory was rejected by the United States Supreme Court in Berman.

This Court said, "In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress... or the States legislating concerning local affairs...".

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.
>
> * * * *
>
> ... Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one business for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine once the public purpose has been established.... The public end may be as well or better served through an agency of private enterprise than through a department of government--or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects...."
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> * * * *
>
> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.... Hunter v. Norfolk Redevelopment & Housing Authority, 195 Va. 326, 338-339, 78 S.E. 2d 893, 900-901...."

It is also respectfully submitted that if this Court were to decide that the Virginia Housing Authorities laws are unconstitutional, this result would create chaos and confusion in the State of Virginia and throughout the United States for the following reasons:

(1) It would stop the public

clearance and recurrence of blight and slum areas in the United States;

(2) It would put the Department Of Housing and Urban Development out of business;

(3) It would overturn all the housing and redevelopment laws in the United States;

(4) The redevelopment and housing authorities in each state would flood this Court with cases endeavoring to obtain a different interpretation of their statutes by this Court.

(5) It would lead to more appellate review because attorneys would try to make Court decisions "retroactive" which would create thousands of appeal cases and mass confusion in the law; and

(6) All redevelopment and housing projects would be in jeopardy in Virginia and all other states in the Union.

The Rudders have shown nothing by way of law or fact to warrant a re-examination of the settled principles of the Housing Authorities Laws of the State of Virginia or the United States as heretofore set forth

in the cases and statutes cited.

Wherefore, the Authority respectfully submits that the Virginia Housing Authorities Laws are constitutional, proper and will aid in the elimination or prevention of blight and/or deteriorated slum areas in the St. Paul Project Area. Futhermore they conform to the sale of property (after acquisition) to private individuals (or public uses) because said sales are incidental or collateral to the primary purpose of the Housing Authorities Laws of Virginia.

Under the cases considering this question, it is clear that once it is established that the taking is for a public purpose, the subsequent sale of the property for private use is authorized.

Under the Hunter case, the primary purpose for the taking under the Redevelopment laws is the irradication of blighted areas and the prevention

and recurrence of blighted conditions. In this case, the taking of the area and subsequent redevelopment of that area is to prevent both the occurence and the recurrence of blighted areas. Thus, the primary purpose is being served by the Authority here. Even though it is clear from the cases which have examined this issue that the entire project area may be devoted to a private use once the public use has been established, in this case, the total project area will not be devoted to private use once the subject area is taken. The project area also will contain a four-lane public highway, public park and recreation areas, and the Clinch River will be re-channeled for the public health, safety and welfare of the citizens. That the public use is being served in this case provides sufficient justification for the

resale of portions of the project area for private use.

II.

FACTUAL ISSUE--ENVIRONMENTAL IMPACT STATEMENT ADEQUATE

There is no constitutional or legal requirement for the Wise County Redevelopment and Housing Authority (the Authority or W.C.R.H.A.) to file an environmental impact statement (E.I.S.), nor is such filing prerequisite to the Authority's power of eminent domain.

The Rudders argue that an environmental impact statement should be required by the Virginia Constitution, and they cite the Rappahannock v. Vepco case and the argument by A. E. Howard pursuant to Article XI., Section One of the Virginia Constitution. However, the Virginia Constitution does not specifically set forth any requirements for the filing of an E.I.S., and Mr. Howard is only philosophizing on what

the law should be in the future in order to protect man's environment. Appellants also request that this Court legislate new laws and make them retroactive, which responsibility lies with the Virginia General Assembly to make new laws.

The W.C.R.H.A. is a political entity created pursuant to the Virginia Housing Authorities Law, and as such must be guided by the specific laws expressed therein. Nowhere in the Virginia Housing Authorities Act is it required to file an E.I.S. or prove that same is adequate and/or sufficient. The Rappahannock case cited above by the Rudders is not applicable to the issue herein for the primary reason that it was not a Housing Authority case nor a redevelopment project.

The Rudders argument that an E.I.S. should be required by the Virginia

Constitution is merely conjectural, argumentative and suggestive. There is no legal requirement in the Virginia Constitution nor in any case of the Supreme Court of Virginia, which requires an environmental impact statement before such project is undertaken, or before the power of eminent domain can be instituted. The Rappahannock case "appears to suggest" (emphasis mine) that an environmental impact statement is needed for major construction projects. The Authority submits that the Rappahannock case in no way suggests or demands that an E.I.S. be prepared in any case in Virginia, much less the case at bar.

The Virginia Supreme Court made the identical conclusion when it said in the opinion of this case, "no such statement (E.I.S.) is required by that Constitutional provision (Article XI, Section One), by any Virginia statute,

or by the case cited by the Rudders, Rappahannock League v. Vepco, 216 Va. 774, 222 S.E. 2d. 802 (1976)". See Virginia Supreme Court opinion, Appendix "C", page 13 of the Appellants' Jurisdictional Statement.

The Rudders also argue that due to the Federal participation in this project in the form of funding by the Department of Housing and Urban Development constituted "major federal action significantly affecting the qualify of the human environment", for which an environmental impact statement is required. Rudders cite 42 U.S.C. Section 4332(2)(c). Your appellee admits that this is the law, and that the Department of H.U.D. was required to file an E.I.S. prior to funding. This was done by the Department of H.U.D. and was made an exhibit in the case, is 235 pages in length and addresses a multiplicity of points and

issues directed to the environment of the St. Paul Project Area.

Again the Rudders fail to cite any redevelopment and housing authority cases in the State of Virginia or in any other state in the Union. However, the Rudders do cite the New York case of Citizens for Clean Air, Inc. v. Corps of Engineers, U.S. Army, and the case of Scottsdale Mail v. State of Indiana. These two cases are cited by the Rudders to block the Authority's right to proceed with the Redevelopment Project because it failed to prepare an adequate environmental impact statement. However, the Indiana case turned on dicta on a procedural requirement that the E.I.S. be filed, and the New York case held that an E.I.S. had not been prepared. Therefore, these two cases are not applicable because an adequate E.I.S. statement was prepared in this

case, and there was sufficient evidence to support this finding both by the Circuit Court of Wise County and the Virginia Supreme Court. See Virginia Supreme Court opinion at Appendix "C", pages 13 and 14 of the Appellants' Jurisdictional Statement.

The Authority submits that the E.I.S. is more than sufficient and adequate, has discussed and addressed all relevant factors involving the environment in the Project Area. The E.I.S. was prepared by the lead agency, Department of H.U.D., in cooperation with Tennessee Valley Authority (T.V.A.) and the Department of Transportation of the Commonwealth of Virginia (Highway Department) with the aid and assistance of Mr. Kenneth Poore of the planning consultant firm of Harland Bartholomew and Associates (Virginia Supreme Court Supplemental Appendix, pages 2-4). The

E.I.S. was prepared pursuant to the National Environmental Policy Act of 1964 with the purpose of determining whether or not the environmental impacts are so adverse to justify terminating the project (Virginia Supreme Court Appendix, page 257). Furthermore, the primary purpose of the E.I.S. was not to make a recommendation, but only to make a statement of those things investigated, and to determine for the benefit of H.U.D. and the Federal Government whether or not the project was worthy of federal funding (Virginia Supreme Court Appendix, page 262). The E.I.S. was submitted to several state and federal environmental agencies, (a list of which is exhaustive and included in the E.I.S. Exhibit), who were requested to submit objections and recommendations, which was done extensively. The response from all of these agencies was favorable to the

project, and there were no objections, but several suggestions were made by these agencies. The E.I.S. is now a part of the Federal Register, and was overwhelmingly approved.

Dr. Charles Bartlett, a Geology professor, and Don Mullins, an engineer and surveyor, testified for the Rudders that the E.I.S. was inadequate because of its failure to address the issues of dust creating black lung, vibrations, flyrock, earthquakes causing property damage, and that the ground water supply would be damaged in the St. Paul area. It is submitted that Rudders' expert witnesses were speculating as to any damages and making conclusions assuming facts which were not in existence at the time.

The Rudders failed to introduce any medical evidence that the removal of dust in the Project Area would create black

lung or increase the presence of pneumoconosis to the citizens of St. Paul. Even to suggest this appears ridiculous in that it is a known fact that persons do not obtain black lung by living near where dust is being removed in state highway construction projects.

The Rudders produced speculative evidence as to earthquake damage, vibration damage, flyrock damage to private property in the St. Paul area and compared this with a project in the City of Norton, Virginia, which has no bearing or no relationship to the case at bar. Kenneth Poore testified at Virginia Supreme Court Appendix page 27 that "the contractor who would be responsible for doing the excavating work would have to comply with the regulations of the Virginia Department of Highways, subject to the review and approval by H.U.D." The Authority must

assume that the contractors involved in the explosions and blasting operations in completing this project would act in a reasonable manner pursuant to the requirements by the Department of Highways, the Department of H.U.D., their insurance companies, management, the regulatory measures of the Town of St. Paul, etc. In other words, it would be a matter of conjecture to say at this time that the contractors in their blasting operations would be negligent in any way whatsoever. In the event these blasting operations do create damage, the injured parties could seek and obtain their proper court remedy.

It is respectfully submitted that whether or not the E.I.S. was adequate is a factual issue; that this issue has been proven; that the E.I.S. is substantially adequate and is not deficient; that the lower courts

have found evidence sufficient to support the adequacy of said statement. Therefore, this Court should not now review the facts again, since they were factually correct, have been approved and found adequate by the Circuit Court of Wise County, Virginia and the Virginia Supreme Court. This Court should not waste its time deciding this factual issue for a third review.

The Rudders for the first time on appeal to this Court raise the issue that the Virginia Supreme Court erred in upholding by "implication" the constitutionality of Section 36-48 (1) and 36-49 of the Code of Virginia because they allowed the Authority to condemn private property whose only real public purpose was the rechannelization of the Clinch River, and where the Federal Government has pre-eminent control of navigable water under the Federal Constitution.

We submit that this issue was not raised in the Lower Courts. Therefore, we request that this point not be now considered or reviewed by this Court. The appellants have waived their rights as to any legal matters relevant to this particular issue at this time.

However, in response to the issue, the Authority categorically denies that the only real public purpose was the rechannelization of the Clinch River for this St. Paul Project. There is more than sufficient and adequate evidence throughout the trial of this case that this was not the only reason for the project. The reason for the project was to irradicate slum or blighted areas, avoid recurrence of same, and redevelop the area in question for the benefit of the public at large.

However, we do admit that the

Clinch River is a navigable stream and is subject to Federal control. Nowhere in the Virginia Statutes or in the Constitutions of Virginia and the United States does it require that before a redevelopment and housing authority institutes eminent domain proceedings that the Corps of Engineers approve of such proceeding. It is admitted that the rechannelization of the Clinch River will not go forward until final approval of the Chief Engineer of the Army Corps of Engineers is obtained. This approval is now being finalized in Washington, D.C.

III.

FACTUAL ISSUE--BLIGHT PROVEN

The Rudders also contend that Section 36-'8.5 of the Virginia Code, as amended, is unconstitutional and the Virginia Supreme Court erred in so holding. Again this is the first time on appeal to this Court that this issue has been raised as to the unconstitutionality of Virginia Code Section 36-48.5. Therefore, this issue should not be reviewed by the United States Supreme Court.

Appellants also argue that the Virginia Supreme Court erred in "impliedly" holding Virginia Code Section 36-49 constitutional under the substantive due process provisions of the Fourteenth Amendment of the U. S. Constitution. They rely on the argument that the St. Paul Project Area is not an urban area but is a rural setting. It is true that the Project Area is located within the limits

of the small town of St. Paul, in a rural area. However, there is no Virginia statute that legally requires the area to be urban in nature. The word "urban" does not appear in the Virginia Housing Authorities Law. Moreover, the statutes are explicit as to the requirements and guidelines for proof of blight in a particular area, and these blighting factors have been proven by adequate and sufficient evidence, which has been approved and/or affirmed by two lower courts in this case.

There is more than adequate and sufficient proof in the testimony and exhibits showing the Virginia State and Federal guidelines of proof of blight in this particular case. The Federal guidelines are less restrictive than the Virginia State guidelines as to proof of blight. However, this proof has been

substantiated for both the Federal and State guidelines and has been so approved and affirmed by the two lower courts. The following reports indicate the proof of both Federal and Virginia requirements for the environmental deficiencies of blight in the St. Paul Project Area, and are found in the Virginia Supreme Court Supplemental Appendix, pages 129-143, and page 183-185. These reports and evidence, which were admitted in the trial court without objection by the Rudders, show the environmental deficiencies, evidence supporting the finding of eligibility and the blighting influences, and also include the Virginia and Federal requirements to prove blight which were substantiated in said exhibits.

It appears that the Rudders argue that all of Southwest Virginia is blighted, and this we certainly deny.

The Rudders ignore the proposition that blight must be proven pursuant to the requirements of Virginia in an area as a whole, which has been done in this case and is merely a factual issue now. This Court looks with disfavor to the review of factual disputes and issues.

The Rudders continuously agrue that this is a "land grabbing case", which we categorically deny, and state that there is no proof whatsoever of such an allegation in this case. Appellants cite the Myles Salt Company, Lt. v. Board of Commissioners, 239 U.S. 478, 60 L.Ed. 392, 36 S.Ct. 204 (1916), a Louisana case which apparently turned on the point that the local board had tried to condemn property "solely to obtain income from it". This certainly would be error, but there is no evidence whatsoever of such an attempt in the case at bar. Therefore, substantive due process was not violated,

and the Myles case is not applicable to the case at bar.

With reference to the theory of "substantive due process" the appellants cite the case of Bristol Redevelopment and Housing Authority v. Denton on page 80 of its Jurisdictional Statement, and cite to this Court "dicta" which has no relevancy to the case at bar. It is apparent that that issue was not before the Virginia Supreme Court in the Denton case, and therefore they did not address the point at that time. Certainly in the case at bar it was not necessary to address this point, since there were many other adequate and sufficient blighting conditions proven in the case, which did not necessitate any further discussion of other blighting conditions or factors.

The Virginia Supreme Court in its opinion held that the Rudders failed to

carry their burden of proving by clear and convincing evidence that the Authority's finding of blight was arbitrary and unwarranted, or that the trial court's similar finding was contrary to the evidence or without evidence to support it. Therefore, the Virginia Supreme Court held that there was no reversible error in the factual issue of proof of blight.

The questions of proof of blight and the sufficiency of the environmental impact statement turn on the particular facts of this case alone and are of interest only to the parties to it. In essence appellants ask this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have been utterly unable to find--absence of blight in the Project Area as a whole and an inadequate environmental impact

statement. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts". United States v. Johnson, 268 U.S. 220, 227 (1925). Moveover, in the realm of factual review and analysis, the rulings of the courts below are treated with and entitled to great weight. In the present case, appellants raise two questions turning entirely on the facts of this case, already resolved twice in favor of the appellee, and without any impact outside the limits of this case. Certiorari, therefore, on these two factual issues should be denied.

CONCLUSION

The constitutional issue involves the legal question of whether the condemnation in this case was an authorized taking. Appellants contend that it was

not a public use, but was instead for a private use because privately owned homes and businesses would be built on the acquired land. The appellants misconstrue and confuse the term "public use" with "public purpose" ignoring that the primary public purpose of blight irradication is a sufficient basis for condemnation under the Virginia Housing Authorities Law, the Virginia Supreme Court decisions and the highest court decisions in the majority of the other states and this Court. The disposition of land after acquisition although designed to prevent a recurrence of the blighted conditions, is incidental and subordinate to the primary public purpose of eliminating blight in a Project Area. To hold otherwise would create chaos and confusion in the Law.

With regard to the issue of the

filing and/or adequateness of an environmental impact statement, appellants ignore that no such statement is legally required by Article XI, Section One, of the Virginia Constitution, by any Virginia statute, or by any Virginia case. In fact, the Department of H.U.D. filed a voluminous analytical environmental impact statement, which was supported by substantial evidence as found and affirmed by two lower courts.

The blight issue is a mixed question of law and fact involving whether the St. Paul Redevelopment Project was blighted under the Virginia Housing Authorities Law. That would be a factual matter, which has been correctly decided in favor of the Authority by the Circuit Court of Wise County and the Virginia Supreme Court. The evidence supported the determination by the Authority, the finding of the trial court and the

Virginia Supreme Court that a majority of all buildings, residential and non-residential, within the Project Area were dilapidated and most of the remaining buildings, the streets and a large section of the undeveloped areas were adversely affected by periodic flooding and other blighting factors. Appellants failed to prove by clear and convincing evidence that the Authority's finding of blight was arbitrary and unwarranted, or that the lower court's similar finding was contrary to the evidence or without evidence to support it, which said findings were affirmed by the Virginia Supreme Court.

For the foregoing reasons appellee respectfully requests that the Appellants' Jurisdictional Statement be considered as a Petition for a Writ of Certiorari, and accordingly, should be denied by this Court.

Respectfully submitted,

Wise County Redevelopment and Housing Authority

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CERTIFICATE OF SERVICE

I hereby certify that a Xerox copy of the foregoing Brief in Opposition was mailed to S. Strother Smith, III, Esquire, at his office at 117 West Main Street, Abingdon, Virginia 24210, on the 20th day of April, 1979, by depositing a copy of same in the United States Post Office with first class postage prepaid, and that the printer has been instructed on the same date to send him three (3) copies

of the printed briefs.

J. Robert Stump
J. ROBERT STUMP